(4)

Supreme Court, U.S.
FILED
NOV 14 2002

No. 01-1559

In the

Supreme Court of the United States

JOSEPH MASSARO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 15, 2002
CERTIORARI GRANTED OCTOBER 1, 2002

195 pp
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Docket as of November 13, 2002 2:08 pm
CLOSED

Proceedings include all events.
1:97cv2971 Massaro v. USA

U.S. District Court
Southern District of New York - Civil Database
(Foley Square)

CIVIL DOCKET FOR CASE #: 97-CV-2971
Massaro v. USA Filed: 04/24/97

Assigned to: Judge Miriam Goldman Cedarbaum
Demand: $0,000 Nature of Suit: 510
Lead Docket: None Jurisdiction: US Defendant
Dkt# in other court: None
Cause: 28:2255 Motion to Vacate Sentence

JOSEPH MASSARO HERALD PRICE FAHRINGER
petitioner [COR LD NTC]

LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA

110 EAST 59TH AVENUE
28TH FLOOR
NEW YORK, NY 10022
212-909-9670

v.

UNITED STATES OF AMERICA
respondent

4/24/97 1 NOTICE OF MOTION by Joseph Massaro to vacate under 28 U.S.C. 2255; No further entries. See criminal docket # 92 Cr 529 (MGC) . (sac) [Entry date 04/25/97]

4/24/97 -- Magistrate Judge Pitman is so Designated. (sac) [Entry date 04/25/97]

4/24/97 2 MEMORANDUM OF LAW by Joseph Massaro in support of [1-1] motion to vacate under 28 U.S.C. 2255 (sac) [Entry date 04/25/97]

11/29/00 -- OPINION #84852, denying [1-1] motion to vacate under 28 U.S.C. 2255 and the motion for a new trial. (signed by Judge Miriam Goldman Cedarbaum); Copies mailed. (orig. doc. filed in the criminal case no. S1 92 Cr. 529, as doc. #150) (ae) [Entry date 11/30/00] [Edit date 11/30/00]

11/29/00 -- Case closed. (ae) [Entry date 11/30/00]

12/8/00 -- NOTICE OF APPEAL by Joseph Massaro; from [0-1] order. Copies of notice of appeal mailed to Attorney(s) of Record: A.U.S.A., David N. Kelley, Esq. $105.00 Appeal filing fee paid 12/7/00 on receipt # E 391844. *(Original Doc. # 151 Filed In 92 Cr. 525-04)*. (dt)

12/8/00 -- Notice of appeal and certified copy of docket to USCA: [0-1] appeal by Joseph Massaro; Copy of notice of appeal sent to District Judge. (dt)

12/27/00 3 CERTIFICATE OF APPEALABILITY, Joseph Massaro has requested that I issue a certificate of appealability to enable him to appeal my recent decision denying his motion purs. to 28 U.S.C. sec. 2255. A certificate of appealability can only issue if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. sec. 2253(c)(2). (signed by Judge Miriam Goldman Cedarbaum); Copies mailed. (ae) [Entry date 12/28/00]

1/18/01 -- Notice that the record on appeal has been certified and transmitted to the U.S. Court of Appeals: [0-1] appeal by Joseph Massaro.

(Original Doc. #153 Filed In 92 Cr. 529-04). (dt)

1/18/01 -- Indexed record on appeal files (00-2720) sent to the U.S.C.A. (dt) [Edit date 01/18/01]

2/5/02 -- MANDATE OF USCA (certified copy) Re: affirm [0-1] appeal by Joseph Massaro. It is hereby ordered, adjudged and decreed that the judgment of the District Court is hereby affirmed. Issued as Mandate: 1/28/02, 00-2720 Roseann B. MacKechnie, Clerk, U.S.C.A. *(Original document # 156 filed in 92 cr 529)*. (sb) [Entry date 02/06/02]

2/5/02 -- MANDATE OF USCA (certified copy) Re: [0-1] appeal by Joseph Massaro. It is ordered that said petition for rehearing is denied. Issued as Mandate: 1/28/02, 00-2720 Roseann B. MacKechnie, Clerk, U.S.C.A. *(Original document # 157 filed in 92 cr 529)*. (sb) [Entry date 02/11/02]

3/19/02 -- Record on appeal files (00-2720) returned from U.S. Court of Appeals: [0-1] appeal by Joseph Massaro. (dt)

INDIV HEARD
CLOSED C10593
H05 2 N

Proceedings include all events. 00-2720 Massaro v. USA
GENERAL DOCKET FOR Second Circuit Court of Appeals
Court of Appeals Docket #: 00-2720 Filed: 12/13/00
Nsuit: 2510 PRISONER PET-Sentence (2255)
Massaro v. USA
Appeal from: U.S. District Court SDNY

- -

Case type information:

1) Prisoner Petition
2) Federal
3) 2255

- -

Lower court information:
District: 0208-01: 97-cv-2971
Trial Judge: Miriam Goldman Cedarbaum
Date Filed: 12/8/97
Date order/judgment: 11/29/00
Date NOA filed: 12/7/00

- -

Fee status: paid

- -

Prior cases:
None

Current cases:
None

- -

Panel Assignment:

Panel: CJS RAK FJM 1705: CA2 10/3/01 am
Date of decision: 10/3/01

- -

JOSEPH MASSARO Herald Price Fahringer, Esq.
Petitioner-Appellant 212-319-5351
32nd floor
[COR LD NTC ret]
Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria
780 3rd Ave.
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v.

UNITED STATES OF AMERICA David Kelley, Esq.
Respondent - Appellee 212-637-1025
[COR LD NTC ret]
U.S. Attorney's Office
Southern District of New York
1 St. Andrews Plaza
Att: Brenda Lewis, Legal Secretary
New York, NY 10007

Official Caption 1/
Docket No. [s]: 00-2720

JOSEPH MASSARO,

Petitioner-Appellant,

V.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Authorized Abbreviated Caption 2/

Docket No. [s]: 00-2720

MASSARO V. USA

1/ Fed. R. App. P. Rule 12 [a] and 32 [a]

2/ For use on correspondence and motions only

12/13/00	Copy of notice of appeal and district court docket entries on behalf of Appellant Joseph Massaro filed. (NOCOA fed - 2255; fee pd) [00-2720] (pr25)
12/13/00	Copy of U.S. District Court Opinion dated November 29, 2000 filed. (pr25)
12/13/00	Copy of receipt re: payment of docketing fee filed on behalf of Appellant Joseph Massaro receipt #: E391844. [00-2720] (pr25)
12/13/00	Appellant Joseph Massaro Form C filed, with proof of service. [00-2720] (pr25)
12/13/00	Appellant Joseph Massaro Form D filed, with proof of service. [00-2720] (pr25)
12/13/00	SEE: 94-1447. (pr25)
12/15/00	Order dismissing appeal without prejudice to the appeal being reinstated upon notice to the Clerk within 30 days from the entry of an order by the dc judge granting or denying a certificate of appealability filed. (pr25)
12/15/00	Certified copy of order dated 12/15/00 disposing of the appeal issued to district court. (pr25)
12/15/00	Notice to counsels of order filed 12/15/00. (pr25)
1/11/01	Copy of district court order granting coa filed. (pr25)
1/11/01	Notice of reinstatement on behalf of Joseph Massaro [Code: P Reopened: 1/11/01] (pr25)
1/12/01	Certificate of Appealability scheduling order #1 filed. Record on appeal due on 1/29/01. Appellant's brief and appendix due on 2/12/01.

	Appellee's brief due on 3/13/01. Argument as early as week of 4/25/01. (pr25)
1/12/01	Notice to counsels of scheduling order filed 1/12/01. (pr25)
1/18/01	Record on appeal index received. (pr25)
1/18/01	Record on appeal filed. (Original papers of district court.) (pr25)
1/18/01	Record on appeal index received. (pr25)
1/19/01	Letter sent to Appellant Joseph Massaro, Appellee USA: informing parties that the record on appeal has been filed with this Court. (pr25)
2/12/01	Appellant Joseph Massaro motion to extend time to file brief, to allow expand COA FILED (w/pfs). [1792329-2] (pr25)
2/15/01	Order FILED GRANTING motion for extended time [1792329-1] by Appellant Joseph Massaro, endorsed on motion form dated 2/12/01. Extended appellant's brief due date is 4/20/01. Extended appellee's brief due date is 5/21/01. Extended argument week as early as 7/2/01. (BJM) (pr25)
2/15/01	Notice to counsels of order filed 2/15/01. (pr25)
2/28/01	Appellee USA affidavit in opposition to the pending motion to enlarge the COA filed (w/pfs). (pr21)
3/14/01	Appellant has filed a motion to expand the certificate of appealability issued by the district court. Upon due consideration, it is ORDERED that the motion is granted to the extent that the certificate of appealability is expanded to include the following issue: whether the district court correctly found that appellant's claim that his

trial counsel acted ineffectively when he refused to allow appellant to testify was procedurally barred based on appellant's failure to raise the claim on direct appeal. See Billy-Elko v. United States, 8 F.3d 111, 114 (2d Cir. 1993). The parties are advised that the Court recently granted a certificate of appealability and heard argument on the following issue which is directly relevant to this case: whether the district court correctly found that a habeas petitioner must do more than merely make a bare allegation that his trial counsel ineffectively refused to allow him to testify in order to successfully attack his conviction. See Chang v. United States, USCA dkt. no. 99-2471; see also Underwood v. Clark, 939 F.2d 472 (7th Cir. 1991); United States v. McMeans, 927 F.2d 163 (4th Cir. 1991); United States v. Martinez, 883 F.2d 750 (9th Cir. 1989);Siciliano v. Voss, 834 F.2d 29 (1st Cir. 1987). In all other respects appellant's motion is denied. See Barber v. Scully, 731 F.2d 1073, 1075 (2d Cir. 1984). Appellant has not made a substantial showing of the denial of a constitutional right" with regard to the remaining issues on which the district court declined to grant a certificate of appealability. 28 U.S.C. & 2253(c). (By: LC)(Before: JMcL, SS, Bertelsman) (pr25)

3/14/01 Certified copy of the order of 3/14/01 issued to the district court. (pr25)

3/14/01 Notice to counsels of order filed 3/14/01. (pr25)

4/17/01 Appellant Joseph Massaro motion to extend time to file brief, to file late FILED (w/pfs). [1832349-2] (pr25)

4/27/01 Order FILED GRANTING motion for extended time [1832349-1] by Appellant Joseph Massaro, endorsed on motion form dated 4/17/01. Extended appellant's brief due date is 6/11/01. Extended appellee's brief due date is 7/13/01. Extended argument week as early as 9/4/01. (By: LG), GRANTING motion to file late [1832349-2] by Appellant Joseph Massaro, endorsed on motion form dated 4/17/01. (pr25)

4/27/01 Notice to counsels of order filed 4/27/01. (pr25)

6/11/01 Appellant Joseph Massaro motion to extend time to file brief FILED (w/pfs). [1869446-1] (pr25)

6/13/01 Order FILED GRANTING motion for extended time [1869446-1] by Appellant Joseph Massaro, endorsed on motion form dated 6/11/01. Extended appellant's brief due date is 6/18/01. Extended appellee's brief due date is 7/18/01. Extended argument week as early as 9/4/01.(LG) (pr25)

6/13/01 Notice to counsels of order filed 6/13/01. (pr25)

6/18/01 Notice of appearance form on behalf of Herald Price Fahringer, Esq., received. (Orig. to Calendar) (pr25)

6/18/01 Appellant Joseph Massaro brief FILED with proof of service.(shelf #59) (pr25)

6/18/01 Appellant Joseph Massaro appendix filed w/pfs. (pr25)

7/18/01 Appellee USA motion to extend time to file brief FILED (w/pfs). [1894685-1] (pr25)

7/18/01 Order FILED GRANTING motion for extended time [1894685-1] by Appellee USA, endorsed on motion form dated 7/18/01. Extended appellee's

	brief due date is 7/20/01. Extended argument week as early as 9/4/01. (LG) (pr25)
7/20/01	Notice to counsels of order filed 7/18/01. (pr25)
7/20/01	Appellee USA motion for leave to file oversized brief FILED (w/pfs). [1897694-1] (pr25)
7/20/01	Appellee USA brief RECEIVED. Problem: motion for oversized brief pending. (pr25)
7/26/01	Order FILED GRANTING motion for leave to file oversized brief [1897694-1] by Appellee USA, endorsed on motion form dated 7/20/01. (LG) (pr25)
7/26/01	Appellee USA brief filed with proof of service. (pr25)
7/30/01	Appellant Joseph Massaro motion to extend time to file brief FILED (w/pfs). [1902131-1] (pr25)
7/30/01	Proposed for argument the week of 10/1/01. (ca96)
7/31/01	Order FILED GRANTING motion for extended time [1902131-1] by Appellant Joseph Massaro, endorsed on motion form dated 7/30/01. It is hereby ordered that any reply brief shall be filed on or before Sept. 17th, 2001. Extended argument week as early as 10/1/01. (For the Court by LG/SC). (pr29)
7/31/01	Notice to counsel re: Motion order extending time to file a reply brief on or before 9/17/01. (pr29)
8/10/01	Set for argument on 10/3/01 . [00-2720] (ca91)
9/20/01	Appellant Joseph Massaro motion to extend time to file reply brief FILED (w/pfs). [1930096-1] (pr25)

9/27/01	Appellant Joseph Massaro reply brief received. Problem: motion pending. (pr25)
10/3/01	Case heard before STRAUB, KATZMANN, MAGILL C.JJ. (TAPE: #25) (ca95)
10/3/01	Order FILED GRANTING motion to extend time to file appellant's reply brief and leave to file out of time [1930096-1] by Appellant Joseph Massaro, endorsed on motion form dated 9/20/01(FOR THE COURT-AV). (ca91)
10/10/01	Letter received from C. LaPlaca requested an oral argument tape. (receipt #164081) (Forwarded to Calendar) (rev)
10/11/01	Appellant Joseph Massaro reply brief filed with proof of service. (ca91)
10/11/01	Letter received from E. Dubno requesting an oral argument tape. (receipt #164101) (Forwarded to Calendar) (rev)
10/15/01	Oral argument tape mailed to C. LaPlaca. (ca95)
10/15/01	Oral argument tape mailed to Herald Price Fahringer for Appellant Joseph Massaro. (ca95)
11/2/01	Judgment filed; judgment of the district court is AFFIRMED by detailed order of the court without opinion filed. (CJS, C.J.J.) [Entry Date: 11/2/01] (pr21)
11/2/01	Notice to all parties of the Summary Order filed 11/2/01. (pr21)
11/5/01	Letter received from law firm Lipsitz, Green, Fahringer, informing the court of its address change. (pr25)
11/7/01	Request for address/phone change sent to systems. (pr25)

11/15/01 Request for address/phone change sent to systems. (pr25)

11/15/01 Appellant Joseph Massaro motion to extend time to file petition for rehearing FILED (w/pfs). [1965407-1] (pr25)

11/20/01 Order FILED GRANTING motion for extended time [1965407-1] by Appellant Joseph Massaro, endorsed on motion form dated 11/15/01. (Petition for rehearing due 12/3/01.) (By: AH) (Before: CJS, RAK, Magill) (pr25)

11/21/01 Notice to counsels of order filed 11/19/01. (pr25)

12/3/01 Appellant Joseph Massaro petition for rehearing en banc [1974802-1] with proof of service filed. (pr25)

1/14/02 Order FILED DENYING petition for rehearing in banc [1974802-1] by Appellant Joseph Massaro. (AH) (pr25)

1/14/02 Notice to counsels of order filed 1/14/2. (pr25)

1/28/02 Judgment MANDATE ISSUED. (pr20)

1/28/02 Notice to all parties of Summary Order mandated 1/28/02 filed. (pr20)

1/29/02 Acco received in records room from team. (rer)

2/6/02 Mandate receipt returned from the district court. (rer)

2/13/02 Mandate receipt returned from the district court. (rer)

3/15/02 Record on appeal RETURNED to lower court. No. of volumes: 7 (reg)

4/26/02 Notice of filing petition for writ of certiorari for Appellant Joseph Massaro dated 4/23/2 filed. Supreme Ct#: 01-1559. (pr25)

10/8/02 Certified copy of Supreme Court order GRANTING petition for writ of certiorari [2070742-1] by Appellant Joseph Massaro, dated 10/1/2. (pr25)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JOSEPH MASSARO, a/k/a
"Joey Bang Bang,"
"Joey Bank," and
JOSEPH KERN, a/k/a "Joey K,"

Defendants.

S1 92 Cr. 529
(MGC)

September 28, 1993
10:04 a.m.

Before:

HON. MIRIAM GOLDMAN CEDARBAUM,
District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
DAVID KELLEY
RANDALL BODNER
Assistant United States Attorneys

-and-

AVRIL FUGGER
Paralegal

HARRY BATCHELDER
BRAD LEVENTHAL
Attorneys for defendant Massaro

MR. BODNER: I understand. I will look in our files. However, that doesn't detract from the fact he said it.

THE COURT: It is not a matter of detracting. It might help me to understand exactly what happened here. I think one could argue that all that Serrano meant to this lawyer was a reduced charge, from the language that he used.

MR. BODNER: Exactly.

THE COURT: I understand.

On the other hand, that's not what Serrano means. So it is not a clear record. Obviously, it would be ideal if the admission were clearer. Very few things in life are perfect.

MR. BODNER: But, Judge, I guess the—

THE COURT: We are laboring this. We understand each other.

MR. BATCHELDER: The second application I have, your Honor, is one that I do with a great deal of reluctance. I have spoken with my co-counsel.

Here is what happened. Your Honor, you may remember when we opened in this case we took a position that there was absolutely no scientific evidence, when in fact a fair part of the opening was devoted to Joseph Fiorito's murder and the fact

there was no scientific evidence whatsoever to bring Mr. Massaro to that.

[1987]

THE COURT: Now you have a bullet.

MR. BATCHELDER: Now we have a problem. I'm not saying whose fault it is. I'm not doing anything. I'm simply saying that approximately two weeks ago we find out that a bullet has been located.

THE COURT: I don't want to interrupt you, but it seems to me this all should have been aired yesterday when we didn't have a jury. Now we have the jury.

MR. BATCHELDER: We went home and thought about it because when we got today — we got the report fully. If I can — I'm not sure Mr. Kelley has given a copy to you, your Honor.

THE COURT: Thank you.

MR. BATCHELDER: The problem we have, your Honor, is that we proposed a defense based on what we knew at that time.

Ten days ago or maybe two weeks ago or more we get the first inclination there is a bullet. You have the correspondence in front of you. It became a torrent of correspondence. Three more letters hit our desk over the weekend and just before.

Your Honor, we are in a position hereof starting out — and I don't wish to mix my metaphors. As Judge Lombard once said, we started out playing basketball and now all of a sudden as we are going into the arena we are

[1988]

playing ice hockey.

It is very difficult. I'm not faulting the government. I should, but I can't. They say that they found out about this as a result of some person coming to the FBI with a bullet while they are fooling around with the car. That may or may not be so. I don't know.

I do find myself in the position of, our credibility, if it is not shot, the shift has had a 45 degree list and we have three torpedoes amidships. I don't know how we can come away from this and I have never been in a situation like this.

THE COURT: One thing, I can direct the government not to refer to that part of your opening on the closing.

MR. BATCHELDER: The cat is out of the bag. I stood there and that was the forceful part of our opening. Mr. Leventhal and I sat down. We went over the opening and our whole theory on cross-examining the Crime Scene people, in cross-examining the Medical

Examiner person, it was all directed to the fact that you never recovered a bullet. You never recovered anything. You may remember that line of examination. Our theory was that it happened somewhere else or it surely didn't happen the way he said it happened.

Now there is supposedly, as I understand it, there is this bullet found behind the driver's seat floor

[1989]

part.

Why we are taking the position that — you know our position about the shooting. There is no big secret about that.

THE COURT: What is your position about the shooting? I know you have tried very hard to undermine the testimony of Esposito, but I thought that was because you wanted to undermine his credibility and his testimony that your client was with him.

MR. BATCHELDER: Absolutely. No question about that. But you may remember our approach with the Medical Examiner person, your Honor, Dr. Lee.

Our approach on that one was posited on the fact, you may remember her first day's testimony about you can't say which one

happened first, which one happened second.

It comes back that the exit wound is the one that happened second. This was our theory. And our whole theory when we talked to the people who came before her, or examined the people before her, was that it never happened in the car.

Now they say, they come to us and say, hey, wait a minute. Time out. Not only is the shell casing found there, but now the fragments match up.

THE COURT: It is much more incriminating if the jury believes your client was in the car. I thought your

[1990]

whole position was he wasn't there.

MR. BATCHELDER: Our position was, too, he wasn't there, and it didn't happen the way Mr. Esposito said it happened. It was a two-pronged approach. It wasn't a straddle approach. I talked to Mr. Leventhal about that.

THE COURT: What is your application?

MR. BATCHELDER: I want a mistrial, your Honor. It will break me to do this. It is going to virtually bankrupt me if I have to try this case again, but I have no option.

THE COURT: What will a mistrial do?

MR. BATCHELDER: I have to start all over again concerning the technical information we have there so we can make a reasonable defense. If it is defensible. And I mean, to have us scrambling, and we have managed to locate one, but to have us scrambling for a ballistics expert two weeks before we end this case to try to come up with something after we have posited this whole approach, I just don't think it is fair, your Honor, most respectfully. I don't think it is fair.

THE COURT: Would you like a continuance?

MR. BATCHELDER: A continuance won't do me any good. If I thought I could get a continuance for 48 hours or 62 hours or next week, it wouldn't do me any good because the whole thrust of the defense was posited — you can see

[1991]

it. You have seen it. We started out with he got no connection with this.

And then the second part of it is, it didn't happen the way they said it happened. And therefore —

THE COURT: One is clearly a major position. Two is a fallback.

MR. BATCHELDER: No, two, we think, Mr. Leventhal and I believe — we think about 50-50, and that's what we talked about. We believe that the scientific

evidence that we had when we started this case, your Honor, when we started this case, supported that position probably better than the other one. The general credibility attack on Mr. Esposito, but the scientific —

THE COURT: What scientific evidence do you have?

MR. BATCHELDER: That there was no indication of an exit. There was no indication of anything on the seat. There was no bullet recovered —

THE COURT: When did you believe there was no indication of an exit?

MR. BATCHELDER: There is no skin. No bone. There is nothing in that car.

THE COURT: You are talking about the automobile?

MR. BATCHELDER: Yes. Therefore, without giving it all away, I will say that our theory was that it didn't happen in that car. And the second shot never happened in

[1992]

the car.

MR. KELLEY: Your Honor, the shell casing is right there. obviously, that is not dispositive. What happened was we later learned of this bullet and had made the comparison, as the record is clear.

Mr. Batchelder opened on page 42 of the transcript and told the jury that there was no scientific evidence that points directly to the defendant. That still is the case.

What is the case now is that, yes, there is nothing scientific that points to the defendant, but yes, we have the shell casing that was in the car that now matches to a bullet that was also found in the car. The exit wound was always present. The fragments were always present.

The question was, what order and where did it take place?

Obviously, they were going to argue that it either didn't take place in the car or it didn't take place in the car at all, despite the fact that there was blood in the car and despite the fact there was already a shell casing there and an exit wound.

THE COURT: I understand. I understand what you are saying. You are saying this evidence tends to corroborate the testimony about what happened in the car.

MR. BATCHELDER: Your Honor, I would think, and I

[1993]

have the utmost respect for Mr. Kelley, but his statement about no scientific evidence was the understatement of the year.

Your Honor, we might be able to live with the shell casing, that's fine.

THE COURT: You started with the shell casing.

MR. BATCHELDER: I said we might be able to live with the shell casing.

Now, your Honor, with respect to not only corroborative — and again I say, I have the utmost respect for Mr. Kelley. Flip the coin and you are standing there as a prosecutor and you find a bullet hole in the back seat, with the fragments which we just got that matchup with exactly the same shell, and to say that that isn't the queen of evidence is to ignore reality.

THE COURT: That's not what we started with. What we started with was whether that totally destroys your opening to the jury.

MR. BATCHELDER: It is not just the opening, your Honor. It is the way we tried the case. It is the way we examined — the opening is just one element of it. It's the way we examined the doctor with respect to the exit wound. It's the way we examined the Crime Scene people. We examined the Crime Scene people, and you may recollect Mr. Leventhal standing there and saying, hey, did you see any

[1994]

bone? Did you see any blood on that back seat? Did you see anything along those lines?

No. No. No.

Now somebody is going to come in And they have an easy fallback. The Crime Scene person says, we just fluffed it. We blew it. Thank you very much and goodbye. That ends our defense on the Crime Scene people.

THE COURT: Look, I'm sure you will argue to the jury, and this is the bullet, and why did it take them four years to find it.

MR. BATCHELDER: You can argue that until doomsday, but that doesn't take away from the grievous impact to the way we structured this case.

THE COURT: In any event, I can't prolong this. I will give you a reasonable adjournment if it will help you to get your expert scientific evidence, but I cannot grant a mistrial.

MR. BATCHELDER: Your Honor, —

THE COURT: You don't justify a mistrial by what has happened.

MR. BATCHELDER: What our expert says will do us no good. Most respectfully, assuming the expert confirms —

THE COURT: I assume your expert will help you work out some theory.

MR. BATCHELDER: No, no. No, no. The ballistic

[1995]

expert, most respectfully, your Honor, is going to be hired and work, indeed, in the same office. Will come in and probably say, I assume, that the shells match up.

THE COURT: Why don't you talk to him first. You have no idea —

MR. BATCHELDER: Let's assume that. What I can't get over, your Honor, I can't get over, no matter if you gave me six months, is the fact that we have posited a defense on the fact that there was no shell or anything recovered. No bullet recovered in that car and that the shot that took place in that car, which the government said didn't take place.

Now, through no fault of ours, three years later, somebody says, wait a minute. We better go back and do this, when we are in the middle of the trial.

I think the least you should do is preclude that evidence, if you won't give me the mistrial. It is not our fault. I don't do this lightly because this is going to be a financial disaster for me if I have to try this case again, but that's not your concern. I don't do this lightly. I sat there and Mr. Leventhal and I went over this last

night at length in any way trying to repair it. We can't.

THE COURT: It is an unusual occurrence.

MR. BATCHELDER: Unusual? Again, your Honor, I

[1996]

have ran this not through two lawyers but through two lay persons just to see —

THE COURT: Let's continue this at the noon recess. I want to get the jury.

MR. KELLEY: Your Honor, one last thing. I had delivered to chambers today a letter concerning our arguments yesterday.

THE COURT: I have not had an opportunity to read it. You can't just put it in the slot and expect it to come out.

MR. KELLEY: I was trying to confirm that you had received it.

THE COURT: I did receive that letter.

MR. BATCHELDER: Your Honor, that letter was handed to me ten minutes before I walked in. I haven't had a chance to look at it.

THE COURT: Let's get the jury in.

STANLEY NANKOF, resumed.

(Jury present)

THE COURT: Good morning, members of the jury.

THE JURY: Good morning.

THE COURT: Try as we may, we can't entirely avoid legal issues. We try very hard

not to dispute them or your time, but sometimes we can't help it.

You may proceed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JOSEPH MASSARO, a/k/a
"Joey Bang Bang,"
"Joey Bank," and
JOSEPH KERN, a/k/a "Joey K,"

Defendants.

S1 92 Cr. 529
(MGC)

New York, N.Y.
October 4, 1993
10:30 a.m.

Before:

HON. MIRIAM GOLDMAN CEDARBAUM,

District Judge
and a Jury

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
DAVID KELLEY
RANDALL BODNER
Assistant United States Attorneys

-and-

AVRIL FUGGER
Paralegal

HARRY BATCHELDER
BRAD LEVENTHAL
Attorneys for defendant Massaro

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MR. LEVENTHAL: Nothing further.

MR. KELLEY: Nothing on redirect, your Honor.

THE COURT: All right. You may step down.

(Witness excused)

THE COURT: I think we will now break for lunch.

We will reconvene at 2:30.

(The jury left the courtroom)

THE COURT: Very well. If there is nothing further we will reconvene.

Are you going to continue with surveillance witnesses this afternoon?

MR. KELLEY: Yes, your Honor.

THE COURT: And you think that will consume most of the afternoon?

MR. BODNER: We have quite a few going.

MR. LEVENTHAL: Your Honor, there is an issue. If you want to take it up now or after the break.

THE COURT: Let's resolve it if we can.

MR. LEVENTHAL: I believe that the government tomorrow will be intending to offer evidence with respect to the newly discovered bullet which they say was recovered from the interior of the vehicle in which Mr. Fiorito's body was discovered.

We would like to address that issue.

THE COURT: All right. Do you want me to

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preclude it?

MR. LEVENTHAL: First, if the court is going to — our first application is for preclusion. If the court is not going to preclude, we are going to ask for a mistrial.

THE COURT: You have already asked for a mistrial. A mistrial I denied.

MR. LEVENTHAL: The issue is with respect to preclusion.

THE COURT: Right.

MR. LEVENTHAL: The first — besides just a completely overview of fairness —

THE COURT: One second, Mr. Leventhal. Let me just ask you a few questions so I can get clear what your position is.

Do you have any reason to believe that the government knew anything about this at the this trial started?

MR. LEVENTHAL: Do I have reason to believe that they had actual knowledge?

THE COURT: Yes.

MR. LEVENTHAL: Your Honor, I personally have no information which would lead me to believe that they had any knowledge of the fact of its existence.

THE COURT: So there is no evidence of

[2884]

wrongdoing, I take it, on the part of the government, because that's important.

MR. LEVENTHAL: My knowledge with respect to the discovery of this bullet and Mr. Batchelder's knowledge based upon the discovery of this bullet comes exclusively from that of the government. I have no other knowledge from any other sources which would, one way or the other, give me any personal knowledge as to whether or not there was any wrongdoing or not wrongdoing, although I will not stand here and accuse Mr. Bodner and Mr. Kelley of wrongdoing because that is not something I am prepared to do.

THE COURT: Do you have any reason to believe that there was any wrongdoing?

MR. LEVENTHAL: No.

The issue, I think, is whether or not, and this I guess would be under Rule 16, whether or not the prosecutors in this case exercised, or the government in this case exercised due diligence in order to discover this evidence and advise counsel in a timely fashion sufficient that we could formulate a defense with respect — and not be prejudiced with respect to it.

THE COURT: Wait a minute just a moment. Wait just a moment. You have shifted grounds a little bit. You are quite right that on the issue of due diligence, the burden of showing that is on the government. But when you

[2885]

say to avoid prejudice, if indeed they exercised due dilligence and turned it up as soon as they could possibly have turned it up, the second part is a non sequitur.

MR. LEVENTHAL: True. However, I think it goes in part and parcel to whenever — the question of due diligence —

THE COURT: Are you arguing even if they exercised due diligence, that they should be precluded?

MR. LEVENTHAL: Yes.

THE COURT: You need to give me authority on that.

MR. LEVENTHAL: I think I am prepared to argue at this point the due diligence aspect.

THE COURT: What showing has the government made on that?

MR. LEVENTHAL: My understanding, and again my understanding is based upon our communications with the government.

This bullet, and I know the case law is fairly straightforward when it talks about that the government, the

federal government should not be imputed with any actions taken by the state government in any prosecution in state court. I will accept that.

This case, however, with respect to the homicide — with respect to the entire case, but

[2886]

specifically with respect to the homicide, was being prosecuted or being prepared by the federal government, by the United States Attorney's Office, Southern District of New York, as early as, if not before, April of 1991. That's the date that Patrick Esposito entered a plea of guilty in federal court where an indictment was sealed — excuse me — where his allocution was sealed, to a sealed information, and pleaded guilty to this murder.

THE COURT: So what you are saying is that by April of 1991 the government must have debriefed Patrick Esposito.

MR. LEVENTHAL: Absolutely.

THE COURT: So they should have known at that time that there was another bullet. Or that there might be a bullet in the automobile.

MR. LEVENTHAL: I'm getting to that.

THE COURT: Well, isn't that your point?

MR. LEVENTHAL: Yes. I want to develop that a little bit.

THE COURT: That is the point, isn't it?

MR. LEVENTHAL: It certainly is. The point of the matter is that the government at that point in time knew all of the facts that they were going to be proving or trying to prove at trial, including the existence of a car, the existence of the fact that —

[2887]

THE COURT: You don't have to go into all that. Your point is this, that as of April 1991 Patrick Esposito had already told them or should already have told them, and maybe he didn't, I haven't heard that yet, that a shot was fired in the automobile.

MR. LEVENTHAL: Correct.

THE COURT: And at that point you are arguing the government was on notice that they should investigate more specifically as to the search of the automobile and whether the automobile was available for further search with respect to this bullet.

MR. LEVENTHAL: Precisely. I think —

THE COURT: I take your point very clearly.

MR. LEVENTHAL: In furtherance of that, I believe, and this is based on conversations with the government, and they said they were going to look into it today,

this morning, to find out the exact dates that this car, which are was impounded by the state, was released.

THE COURT: But in any event, it is your position that as of April of 1991 they should have made that inquiry?

MR. LEVENTHAL: Absolutely. And, what we have learned, what the defense has learned is that after this trial commenced, right, they commenced, they had a jury and we were commencing with opening arguments and producing of witnesses. The government took the VIN number, the vehicle

[2888]

identification number, the FBI took the vehicle identification number or some agent of the United States Attorney's Office took the vehicle identification number, ran that number through the Department of Motor Vehicles, tracked down a subsequent owner, the present owner of this vehicle —

THE COURT: You are saying that should have been done in April 1991.

MR. LEVENTHAL: Years ago.

THE COURT: I understand your position.

MR. LEVENTHAL: It is as a result of that along with their communications with this individual, who is now the owner of

this car and the conversations that they had with this individual —

THE COURT: Your position is all of that should have started by April of 1991.

MR. LEVENTHAL: Yes, Ma'am.

THE COURT: And if it had, you would have been in a position to have known about it in advance of the trial.

MR. LEVENTHAL: And we would have prepared a defense and cross examination of witnesses, all right, with that in consideration, and understanding that fact to be in existence, and we were not permitted that opportunity.

THE COURT: All right. Mr. Kelley, why was this not pursued in April of 1991? Or Mr. Bodner, whichever of

[2889]

you wants to address this.

MR. BODNER: Judge, just to give the chronology as I understand it. I want to nail down a little more precisely when —

THE COURT: It doesn't have to be April of '91. I assume that you debriefed Patrick Esposito sometime ago.

MR. BODNER: Judge, I was not involved in the case at that time, but it is my understanding that when Patrick Esposito first came in, he gave consistent facts to the government that a second shot had in fact been

fired in the car. No question about that.

THE COURT: Whenever that was, it was a long time in advance of the trial.

MR. BODNER: Absolutely. No question about it. What happened is the Crime Scene for the City of New York did an examination of the car when they found it on September 21st of 1990.

THE COURT: That was before —

MR. BODNER: Before Esposito became a government witness.

THE COURT: What you had was a report from the crime scene, is that correct?

MR. BODNER: Exactly. The report was, so far as we understood, they had done a full examination of the car.

THE COURT: I understand, but what made you

[2890]

inquire later when you hadn't inquired earlier?

MR. BODNER: Then as we began to approach trial in early '93 we began to look for the car. We then —

THE COURT: Why didn't you do that originally ?

MR. BODNER: Judge, we were at that point relying on the Crime Scene report that a thorough search —

THE COURT: What made you decide not to continue to rely on it?

MR. BODNER: In a effort to get ready for trial we decided to find the car.

THE COURT: I have a lot of trouble with that.

MR. BODNER: Judge, at that time —

THE COURT: Because in an effort to get ready for trial, before selecting a jury and before advising the defendant that there was no bullet retrieved, if you were going to pursue it, it seems to me you had some obligation to pursue it.

MR. BODNER: Well, Judge, there are a couple things here.

First off, it was our understanding that the car had been impounded.

THE COURT: Well, I understand that.

MR. BODNER: If I may finish, Judge, please.

It was our understanding that the car had been impounded. As a result, in early 1993, long before the

[2891]

trial was set in this case, we sought to get that car in order to do any further reviews or any further analysis or inspection that should be required for trial.

THE COURT: When did you do that?

MR. BODNER: That was in January of 1993.

THE COURT: So in January of '93 what did you do?

MR. BODNER: At that point we looked for the car, assuming that it was impounded by the City of New York. At that point we discovered that it had been released from impound.

THE COURT: So in January of '93 you found that it had been released?

MR. BODNER: Correct.

THE COURT: What did you do then?

MR. BODNER: At that point we took steps —

THE COURT: What steps?

MR. KELLEY: Your Honor —

MR. BODNER: Mr. Kelley knows the details.

MR. KELLEY: First of all, your Honor, you are correct, the record is correct that Mr. Esposito had given all these details.

A couple months after that, in the summer of '91, the FBI and the NYPD went out to the impound area and did another inspection on the car even though, despite the Crime Scene report, that nothing had been found during their

[2892]

inspection.

It is my understanding —

THE COURT: What did they do at that time?

MR. KELLEY: Just looked through the car to see if there was anything that was missed by the Crime Scene. The Crime

Scene Unit had done an investigation both at the scene and again once it was taken into impound because it was dark at the scene.

Late in '92, beginning '93 we wanted to take another look at the car to be triply sure because we had already done two examinations and we found that the state, unbeknownst to us, the Queens District Attorney's office, who had been out of the case since the very beginning of '91, had released the car without consulting us, which came much to our shock and dismay since they had no authorization essentially to release evidence we were going to use in our case.

THE COURT: You say this is in January '93 —

MR. KELLEY: My best recollection is late '92, early '93. Thereafter we did make some efforts to find the car and we were not successful. In fact, I think if my recollection serves me that we thought that the previous owner was in Florida and couldn't be contacted.

We tried again to find the car and located it several weeks before trial. And several weeks before trial

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we located it and it was on Long Island by, I think, either the second or third owner. We went to that owner, two detectives, pulled up the

rug, pulled up the seat and found nothing.

Now, they left —

THE COURT: This was when?

MR. KELLEY: I believe in August of this year. A few weeks before trial. Once we were able to find the car.

Now we are of the view, okay, there is no bullet. Crime Scene was right. The detectives who checked it, Crime scene twice checked it and found nothing. The detectives who checked it in December '91 found nothing. Now we again have found nothing. So obviously we are doing this because if there is a bullet in there it is very important to our case. We found nothing.

Right as trial was beginning, what happened was when the detectives pulled up the carpet it unearthed blood and decay that had been left there from the murder. There were dead maggots and so forth.

THE COURT: When you say the detectives —

MR. KELLEY: In the summer of '93 before trial.

THE COURT: August of '93.

MR. KELLEY: When they pulled up the rug they disturbed what had settled there. Blood and dead maggots. The owner to their dismay found it was quite smelly so what

[2894]

they did on their own was to go and pull out the insulation underneath the rug thinking that by removing that insulation they would remove the smell. In ripping out the insulation, which I understand to be quite a tedious and disruptive task, a bullet dropped out onto the floor of the car, at which point they called us. We got it.

THE COURT: What was the date they found that bullet?

MR. KELLEY: September 6th. We then took it and asked for an analysis by the laboratory and by ballistics to find out if there was any connection with what we had, and that's when I notified defense counsel.

THE COURT: When you asked that they examine it?

MR. KELLEY: Once I found out that it was a bullet that was likely to be a .380, our first inquiry was whether or not it could be matched to that casing. We were told, no, it could not.

Then we asked to see whether there could be a serology examination made, and the lab said no, they could not do that. And during those few days is when I told counsel about it and it is in my letter.

At the end of that week we hadn't had anything certain about what that bullet, what the origin of the bullet was and whether there was any connection. But I told counsel about it and the following week when we had

[2895]

discussed it before your Honor it was being examined by ballistics and as soon as we determined, ballistics determined there was a connection between the two bullets, both the court and defense counsel were apprised of that.

THE COURT: When you found that the car had been released, what steps did you take to reacquire it?

MR. KELLEY: We tried to find the person to whom I believe it had been released. It was my understanding that person was in Florida, and the efforts made at that time to find the car were unsuccessful. I'm not quite sure —

THE COURT: Who made what efforts?

MR. KELLEY: Members of the New York City Police Department and people in my office tried to track it down.

THE COURT: Did you advise the defendant that that car had been released and was found?

MR. KELLEY: No, we had not. But from the very beginning of the case when we made

discovery, there was no request with regard to making examination even though our evidence we said would be available, all the evidence we intended to use at trial would be available for their discovery and inspection, and no requests were made at that point, nor has any been made until this time. In fact, I made discovery in this case in August of '92 —

THE COURT: So there has never been a request to

[2896]

examine that automobile?

MR. KELLEY: That is correct, your Honor.

In all fairness, Judge, I never mentioned the car specifically. The evidence that the government intended to use would be available for their inspection at a mutually convenient time and not at any time thereafter did they say hey, can we look at the car?

The Crime Scene photos were available of the car and the body in the car that were looked at much later, say in the summer, early summer of this year. In fact, I believe defense counsel even subpoenaed from the Police Department all the records they had that we later turned over as 3500 material. That was available for discovery and inspection. At no time did we

receive a request from them, where is the car? We want to look at it.

THE COURT: Why would they want to look at it if they were advised you hadn't found the bullet. They certainly didn't want to find the bullet.

MR. KELLEY: Judge, we didn't find the bullet either. There are other things they could have looked at the car. If they were interested in fingerprints. Perhaps their own experts could have examined it. No request was made. It was something we tried to do and were unsuccessful.

THE COURT: Did you advise anybody that it was

[2897]

impounded by the New York City police and remained impounded?

MR. KELLEY: That was the procedure, Judge. No, I didn't.

THE COURT: I understand you never assumed anything.

MR. KELLEY: Judge, if I have a piece of paper in front of me from the New York City Police Department that says impounded by the detectives that go to the impound area and they say the car was there, I think it is a safe assumption that the car is is there. Unfortunately because of the intervention by the Queens District Attorney's office, that was taken

away from me. I checked it. It was there.

THE COURT: When did you check that it was there?

MR. KELLEY: After we had debriefed Esposito in the summer of '91 the agents went there and examined the car even though they already had the reports of Crime Scene Unit that said a check had been done and nothing had been found.

There was a delay in this case. We were ready for trial. You were going to set a trial date and we were talking about it in October. Right after that the Queens District Attorney's office releases the car without —

THE COURT: Without advising anybody?

MR. KELLEY: Absolutely not.

[2898]

THE COURT: Neither you nor the New York City police were advised by the Queens District Attorney's office, is that correct?

MR. KELLEY: To the extent I knew about it, Judge. We did not know about it.

Obviously, to be taken out of the impound area some sort of paperwork has to be filled out by the police department. The way the Queens District Attorney's office was involved is that they initially

were the office to prosecute the murder and had charged Patrick Esposito. It was several months later that we intervened and essentially took over the case, although they still maintained an open file on the case. That's why I guess they thought they had the authority to release it even though that there had been a relationship developed and we told them not to release the car.

THE COURT: Have you ever contacted the Queens District Attorney's Office to find out what prompted them to do that?

MR. KELLEY: They just thought — they never consulted with us and they thought they could do it. The Assistant District Attorney who, without thinking, thought, we don't have Esposito here. We are not trying this case. We can release it.

We were quite upset with them and conveyed that

[2899]

to them when we found out about it.

MR. BATCHELDER: Your Honor, I just would like to say that Mr. Shargel put in a rather detailed discovery request. It is in the file.

THE COURT: I would like to see that.

MR. BATCHELDER: It is in the file, and he did it for all parties. More importantly, when Mr. Leventhal and I were preparing the

case, we went and saw at Mr. Kelley's offices all the photographs and everything else that we could see.

THE COURT: That's all they had at the time.

MR. BATCHELDER: You have to step back from us and take a look at the Crime Scene reports and everything else with respect to that. Even if we had the Crime Scene reports, all right, it would have showed us that there was no bullet.

THE COURT: Well, I understand. But everything that the agents did as I understand it last summer also would have shown there was no bullet.

MR. BATCHELDER: The second thing is, Mr. Leventhal and I to this day, we never knew that there was a second tearing of the car apart. I don't have a report on that. I never have.

THE COURT: You are talking about the intermediate one. But the representation has been made that

[2900]

that wouldn't have made any difference.

MR. BATCHELDER: Fine. We are sitting here and we are starting along in the trial on the basis that there is no bullet. Now we are three-quarters of the way into the trial, when all of a sudden there is a bullet that matches —

THE COURT: Wait, wait, wait. Just a moment. I thought you were advised on September 6th that the owner had pulled out the insulation and a bullet had dropped out. Isn't that what you just represented to me, Mr. Kelley?

MR. KELLEY: No, your Honor. The bullet was discovered on September the 6th and once that I submitted it to ballistics — this is what I said, Judge.

THE COURT: Then I misunderstood you. I don't understand why you didn't advise the defense on that date that a bullet had been found —

MR. KELLEY: I didn't know anything that could be done with it. The initial thing was that there could be no match made to the case. So then we submitted it for serology. At that time I advised counsel that we had discovered this.

THE COURT: Why did you wait a minute? Once you discovered that a bullet fell out when the owner pulled out the insulation, we had not yet finished jury selection at that point, isn't that right? Isn't that right, on

[2901]

September 6th?

MR. KELLEY: Beg pardon?

THE COURT: We were still in the midst of jury selection.

MR. KELLEY: The jury had been picked —

THE COURT: What happened on September 6th?

MR. KELLEY: It was a holiday, your Honor, Labor Day.

THE COURT: Then the trial — opening statements didn't start until September 8. Why didn't you advise —

MR. KELLEY: September 7th, your Honor. I didn't know if there was any connection to the bullet.

THE COURT: Suppose you didn't.

MR. KELLEY: Beg your pardon?

THE COURT: Suppose you didn't. If you had put them on notice that something had turned up that might be of use, why didn't you have that obligation at that point?

MR. KELLEY: I was trying to ascertain if —

THE COURT: I understand what you were trying to do. In the meantime, though —

MR. KELLEY: In fact, the first indication was there was nothing I could do with it because there was no match.

THE COURT: Then you could have advised them of that when you found that out.

[2902]

MR. KELLEY: I didn't see the need to do that since there was nothing that could be done. My initial report from ballistics was nothing could be done because a comparison couldn't be made to the present evidence.

THE COURT: I understand. You wouldn't drop the inquiry at that point. Of course not. Why would you? You wanted to pursue it, isn't that right?

MR. KELLEY: Well, at first I didn't pursue it, Judge, and then I did, yes.

THE COURT: That, it seems to me, is a troublesome point. Why in view of the fact that we were on the eve of trial you did not advise the defense that although you had no reason to believe that you could use this, that had turned up?

MR. KELLEY: Your Honor, I think the important point, too, is also to look at, you know, trying to discover if there is any prejudice here. The issue is this is what they opened on, this is on page 42 of the transcript. There is no scientific evidence that points to defendant Massaro.

THE COURT: That is still correct.

MR. KELLEY: That is still correct. More importantly, Judge, when they were told there was a bullet, Mr. Batchelder had just started his cross examination of Patrick Esposito. He had all Friday and he had the whole

[2903]

weekend to think about my letter where I disclosed the bullet and that did not change anything. He still continued in his cross examination

of Patrick Esposito. After knowing what we knew. And also that continued well before anything relating to the Medical Examiner, and so forth.

I think the record, you would be hard put to find any sort of prejudice here to the defendant once this trial started.

THE COURT: I think that's what I want to examine. What is the date exactly on which you advised the defendant of this discovery?

MR. KELLEY: I did it by letter of —

MR. BODNER: Judge, my memory, the letter is dated September 11th, 1993.

MR. KELLEY: Your Honor, what I did was, I didn't learn of the bullet until the following day from the agent and I asked to get a check to see what the connection was. And then later that week is when I disclosed it.

THE COURT: On September 11th you are telling me that Patrick Esposito not yet been fully cross-examined?

MR. KELLEY: They started the cross examination briefly late Thursday afternoon. We broke. The letter was delivered by fax over the weekend concerning the bullet. And on Monday morning, again, before cross-examination resumed, and the bulk of the cross examination of Esposito

[2904]

occurred that, after that weekend and after the letter had been received.

[2905]

THE COURT: And was he your first witness?

MR. BODNER: He was the first witness and who had nothing to do with it.

Then Patrick Esposito took the stand on Wednesday the 8th. He was on direct examination for Wednesday the 8th and virtually all of Thursday, September 9.

Mr. Batchelder had, I believe, had all of about 40 minutes of Esposito on cross-examination, and the thrust of the-cross-examination was his bail status, the deal with the Government. And there was nothing pinpointed in any prejudicial way, in my memory, to the details of the murder at all.

The thrust of the cross-examination concerning the murder commenced on Monday the 13th and into, I believe, Tuesday, September 14. So by that time Mr. Batchelder was completely on notice about what we knew at that time.

Furthermore, the cross-examination of the crime scene and the medical examiner was well after the September 11th letter. And my memory — I can't put a date on it, but

my memory is that there was a conversation with counsel before we wrote the letter on September 11. But I can't put a date or a time. It was an informal conversation, not on the record. But I have a memory of that.

MR. BATCHELDER: Your Honor, the letter is the letter of September 11, and I have a copy here. I

[2906]

understand, it says by hand, but I believe it was sent by telefax person.

THE COURT: So it was, in effect, hand delivered.

MR. BATCHELDER: Yes. And your Honor knows I work every Saturday and Sunday. I probably got it — there's no question about it, but I think the contents are rather interesting. It says and this is five days afterwards. It says to "please be advised, on September 6 a bullet was recovered from under the carpet of the rear seat of the Monte Carlo in which the body of Esposito was discovered" and that the bullet has been submitted to the New York Police Department for tests and "will be available for your examination shortly."

"In addition, a video recording demonstrating where in the vehicle the bullet was recovered and the hole that was caused in the carpet of the

car is available for your inspection in the United States Attorney's Office.

"We will advise you promptly if the government intends to offer either the video or the bullet in its case in chief."

Now, I don't have the next letter.

THE COURT: I understand, but let me stop you right there. At that particular time you were on notice that a bullet had been retrieved.

MR. BATCHELDER: Yes, on the Saturday or

[2907]

Sunday — I believe the Sunday evening.

THE COURT: The first time you raised it with me, I offered you a continuance.

MR. BATCHELDER: A continuance would not have done us much good. We managed to have the bullet submitted to our expert, and as we talked with our expert today concerning the matchup — that is fine. I am saying to your Honor, as your Honor knows, our position was that — and you may remember, on cross-examination of Dr. Lee by Mr. Leventhal —

THE COURT: I understand. But why did you take that position once you were advised that a bullet had turned up?

MR. BATCHELDER: We took the position, your Honor, because as we started out thinking that there had been no bullet, and she didn't know which shot came first or second — you may remember that.

THE COURT: But on September 11, which was some time before she testified, you were advised that a bullet had turned up.

MR. BATCHELDER: Except they didn't know whether there was any matchup.

THE COURT: But in fact they did not.

MR. BATCHELDER: My question to you then is why do we go for seven or eight or ten days further to find out

[2908]

that there is a matchup?

THE COURT: Why didn't you ask for a continuance until they determined that? I offered you a continuance the minute you spoke to me.

MR. BATCHELDER: You offered us a continuance after, your Honor.

THE COURT: If you had applied for it that moment, I would have offered you a continuance.

MR. BATCHELDER: Your Honor, perhaps I will take the weight for that. But if that rises or falls as to the prejudice, I will take the weight. But I think the government, most respectfully, should have

been able to have, in our hands — since they had the bullet and they have the people — it took our expert all of about 15 seconds to do this on a microscopic examination. It didn't take a week to get this to us, most respectfully.

THE COURT: If I were you, I would have immediately asked —

MR. BATCHELDER: Your Honor, I was married once before, and we make mistakes. I may have made a mistake. I made a mistake. Is Mr. Massaro to pay for my mistake when the government comes in and says they found a bullet? Are we to split hairs like this?

THE COURT: This is not a matter of splitting hairs. I am trying to determine whether the government did

[2909]

anything wrong here. I want the best authority both sides can give me on whether that matters.

MR. BATCHELDER: Your Honor, the question is —and Mr. Bodner is very keen on antitrusts. Did the government use due diligence to get this in our hands? That is the issue. And, your Honor, that is what you have to decide.

THE COURT: You need to give me a case and say that that is the issue. And if

the government didn't have that examined fast enough, that I should preclude that. I need to consult authority.

MR. KELLEY: I have looked at some cases, and I will do so again. I think you will find facts that go all over the place, and it's up to the Court's discretion.

THE COURT: I find it troublesome. I find the time sequence here troublesome.

MR. KELLEY: I want to make one point that should be made. Yes, we were working on an assumption all along that no bullet had been found in the car. And anything can happen to a bullet. It could have gone right through and out of the car. It could have bounced out anywhere. It could have come out —

THE COURT: I understand.

MR. KELLEY: Let me go right to the point. The point is there was a .380 shell casing in that car. The

[2910]

person is going to be hard put to make the argument that — that shell casing was found in the car and no bullet. The bullet could have fell out of the body when it was moved.

THE COURT: What you are saying, that the shell casing itself was substantial evidence that there had been a shot in the car?

MR. KELLEY: And there was a photograph.

THE COURT: So you were taking a very big risk when you were asking the jury to ignore that.

MR. BATCHELDER: Your Honor, there was nothing on the shell casing that said it had anything to do with this one, and we understood when we looked at it, given the size of the exit wound, that it was not a .380. That is what we looked at.

THE COURT: Don't you have to look at the shell casing?

MR. BATCHELDER: Your Honor, we believed that that shell casing had nothing to do with that matter. Indeed, the government contended when they talked to us that they didn't know that the shell casing matched up.

THE COURT: That's not the point. You were on notice that there was a shell in the car, so it was hard for you to take the flat position that, under no circumstances was a bullet fired, isn't that right?

MR. LEVENTHAL: I disagree, your Honor. And the

[2911]

reason I disagree —

THE COURT: All right, I need your best cases on the subject, and I will have to analyze what you knew and should have known and could have

believed. You know you also can't assume anything. No good lawyer assumes anything.

MR. BATCHELDER: Your Honor, I dare say, with all due respect to the government, but when it stands here — we looked at every single piece of physical evidence that was to be produced in this case. We made them — we even went through dungarees. We went through everything.

THE COURT: But you never requested to look at the automobile.

MR. BATCHELDER: Your Honor, I didn't even know where the automobile was.

THE COURT: Did you ask?

MR. BATCHELDER: No, I didn't.

THE COURT: Why not?

MR. BATCHELDER: Because I have got a crime scene report which indicates that there is nothing in the automobile that is going to be helpful to us.

THE COURT: So you are telling me you didn't want to know?

MR. BATCHELDER: No, quite the contrary. Their evidence showed that there was no exit. There was no bullet

[2912]

in the car.

THE COURT: It showed there was no bullet in the car. The question is this: Is the fact

that there was a shell casing a sufficient concern from which, for example, the government might have argued that that confirmed that there was a bullet?

MR. BATCHELDER: Except that we took the position, and when we spoke to our expert, that the exit wound was from a different type of weapon. That is what we understood it to be, that the .380 shell casing was not germane to what our expert had said —

THE COURT: Did you ask what the government's expert said about that?

MR. BATCHELDER: Your Honor, the government's expert was Dr. Lee who was brought in here about 10 minutes before she testified:

THE COURT: She didn't testify on the shell.

MR. BATCHELDER: We tried to get a hold of Dr. Jean without much luck and tried to track him down. And he is around.

But with respect to the issue of the shell casing and the exit wound, we spoke to our expert, your Honor, and our expert indicated, in his mind anyway, that the exit wound was not consistent with a .380 bullet. The shell casing was not that crucial to us.

[2913]

THE COURT: But she testified you can't tell from that.

MR. BATCHELDER: I am telling what our expert says.

THE COURT: But you can't expect the government to know what your expert says.

MR. BATCHELDER: You can't put it to us when we rely on what he says about the exit wound. If this is a hollow soft-nosed — it is one of the smallest exits I've seen in any life.

THE COURT: We listened to the medical examiner testify that you cannot tell anything about the bullet from the exit wound.

MR. BATCHELDER: I am sorry, your Honor, we disagree with that. And our expert disagreed with that. And our expert has a lot more experience that a person who was brought up six days before to testify, most respectfully.

So this is the way we approached it. It's irrelevant. If you remember the cross-examination, your Honor about that medical examiner, the very next day after we showed up with the x-rays — which were forgotten — "Oh, by the way, now we can tell which is the second shot." At that point, at that point, yes, then it stops.

THE COURT: You requested the x-rays, and I

[2914]

directed the government to track them down.

MR. BATCHELDER: And it was at that particular time, your Honor, that she told us that the

second point in the shot she could say there was a second shot in the car. It was at that point —

MR. BODNER: Exactly, which is important for putting everything in perspective for the government. Prior to the cross-examination of the medical examiner, and even though we subpoenaed the medical examiner's office for all those records twice, as came from cross-examination, we didn't get full compliance because we never got the x-rays.

THE COURT: The medical examiner testified that they were misfiled.

MR. BODNER: Exactly, Judge. It was at that point, even at that point that we could tell which shot was fired first and that in fact the second shot was the shot with the exit wound. Prior to that examination of the medical examiner, it was hard to tell whether it was the first shot or — it was impossible to tell whether the first shot or the second shot that had the exit wound.

Therefore, when no bullet was found in the car, given the government's thinking, given we didn't know the order of the shots, it was the second shot that was without the exit wound. That is why no bullet was found in the car.

THE COURT: I understand all that. The only

[2915]

question is whenever you should have have gotten this information sooner.

MR. BODNER: Judge, the information about the x-rays —

THE COURT: I am not talking about the x-rays. There is no motion for preclusion of the x-ray. It was the defendants who requested that you search for the x-rays and they got the x-rays.

MR. BODNER: But the point at the time that of the second bullet was on September 11. There was no prejudice whatsoever to the defendants. At that point all the cross-examination, the whole line much inquiry they were on notice they knew what we did. They chose not to pursue it and not to ask for a continuance. And now Mr. Batchelder is saying that the government is to blame for what they did. That simply is not true. He chose to pursue that line of cross-examination.

THE COURT: You could have asked for a continuance in the middle of your cross-examination of the medical examiner.

MR. BATCHELDER: Yes.

THE COURT: The question is, is this unfair prejudice. The usual rule is we want to get at the truth, isn't that right?

The only question is, is there unfair prejudice here, isn't that the issue?

[2916]

MR. BATCHELDER: That is the decision for you to make, your Honor. And you have mostly all the facts. With all due respect to Mr. Bodner, they are saying "Oh, we did everything and now it's our fault because we didn't ask for a continuance. Most respectfully, your Honor, every report that Mr. Leventhal and I looked at showed no exit. Now, if I am cynical, I am showing that, once they got wind of where it was going, this came about. They say no. Fine and that is just where it stands. That is a hard call and that is your call, your Honor.

THE COURT: I understand. I want you to give me your best case on the subject.

I want you to do the same, the government.

And I would like a very clear written recital of exactly what happened, the sequence.

MR. BATCHELDER: Your Honor, they made a videotape. We got it this weekend. They made a videotape of the search of the car and that the government intends to play. We got that this weekend.

MR. KELLEY: We told him it was available when we wrote the letter of September 11.

MR. BATCHELDER: In addition, the recording where the bullet that was recovered and how it was caught in the carpet. I looked at it for the first time this weekend.

THE COURT: Why did you wait?

[2917]

MR. BATCHELDER: Because I am in the middle of keeping five balls up in the air, your Honor. I am coming in here at 8:30 in the morning. Maybe I missed it. Let me give it to you right where it is. So that there's no indication of delay on our part, we then attempted to locate it and the government, if we could talk to the person who owned the car now, to discuss it. The government, as is usual, came up to us and said, by the way, they don't want to talk to us.

THE COURT: That has nothing to do with the problem.

MR. BATCHELDER: Your Honor, we are trying to cover all the bases. We would like to talk with that person to find out if that is exactly the way —

THE COURT: That is a separate issue. Please let's get back to the beginning. You moved for a mistrial. When was that?

MR. BATCHELDER: Your Honor, I think it was almost —

THE COURT: You didn't move for a mistrial when you got that notice. You moved for

a mistrial after they found out that the bullet matched up.

MR. BATCHELDER: After the report that was given to us on September 27, your Honor, of the date of the ballistics report, the worksheet is September 27. It took

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them 16 days from September 11 to compare the bullet that they had with the bullet fragments. That is what the government's position is. We got those bullet fragments. We got this worksheet on September 27, and my best estimate is, it was over at the office, with the assistance of the agents, the very next day.

THE COURT: So what you are telling me, whoever does these things, moves with the speed of molasses?

MR. BATCHELDER: No. Most respectfully, your Honor, I submit, if they had it on the 11th and they brought it over to New York P. D. and Detective Carbone is part of the New York Police Department and told us to do it because we are in the middle of a trial, it would have been done.

It's not an extensive examination that takes hours and hours. But the government then wants to submit ot to serology, and they decided they couldn't submit of to serology until they got the ballistics back because it would have resulted in the de-

struction of the bullet. That is what the story is.

Now the date of the occurrence, I am just looking. Here it is. The date that this information was received, according to the casework sheet was 9/22 of 90 when a lot stuff was taken. There is no indication — notification seemed to be 9/24, 9/28, but it's not quite clear what date that this was given over to them, based on

[2919]

that worksheet, and I don't know. But I know that, if they had it on the 11th, the first time we knew that the bullet matched up was some 16 days later.

MR. KELLEY: That's not quite accurate. On September 24 we had a conversation in court, and the Court directed me to find out, and I told the Court I would find out by Friday afternoon.

On Friday afternoon I sent a letter giving all the preliminary findings that the fragments found from Fiorito's head and similar to the bullet that was found and the fact that we were trying to do serology, but it would cause the destruction of the bullet.

When we initially found the bullet, what we tried to do was get serology, do an analyses and they were having

a test with the proper test. They didn't have the proper materials. The moment we contacted ballistics and September — the date that Mr. Batchelder referred to is September 27. That is 1990.

MR. BATCHELDER: I am talking about when they first got it.

MR. KELLEY: September 27, 1990, that is the date of the murder. What they received on that date were the fragments that were removed during the course of the autopsy. The rest of the material, the bullet that was found from the car, they received on the 24th. That is from

[2920]

the casework sheet, because the person who told me that it was similar and so forth was not the person who did the worksheet. That person was unavailable. We said we have to have it done. We've got it for certain. What is the story, and that is on the 24th when he made out the worksheet and put September 24.

THE COURT: I would like to know what the legal issue is, but is this an issue of prejudice, if there is no misconduct.

MR. BATCHELDER: Yes, I think that is fair. Sure. It has to be. It has to be. That is your call, your Honor.

THE COURT: I want the best citation from each side, and I would like a clear chronology from the government of exactly what happened.

MR. BATCHELDER: Your Honor, I think the government has sent to you, least ways it looks like it, the letters of September 11 and September 27. I don't have what I call the second letter, the 24th. I don't have a copy of that.

THE COURT: The issue for me is whether the letter of the 11th should have put you on notice, isn't that right?

MR. BATCHELDER: That is part of it, that is right.

[2921]

THE COURT: Because the question is fairness.

MR. BATCHELDER: The question is fairness exactly.

Your Honor, could we come back at 2:35 could I ask for an extra five minutes.

(Lunch recess)

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AFTERNOON SESSION

3:20 p.m.

THE COURT: Good afternoon.

MR. LEVENTHAL: May we approach for a moment?

(At the side bar)

THE COURT: We were delayed because a juror was sick.

MR. LEVENTHAL: We would just like to advise the court that is my partner and he is going to sit and take some notes and be here here for a little bit of the trial. Anthony Emanuel.

THE COURT: All right. He is not making an appearance, is he?

MR. LEVENTHAL: No. He is going to be sitting there and taking notes.

THE COURT: I take it nobody objects?

MR. BODNER: No objection.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JOSEPH MASSARO, a/k/a
"Joey Bang Bang,"
"Joey Bank," and
JOSEPH KERN, a/k/a "Joey K,"

Defendants.

S1 92 Cr. 529
(MGC)

October 6, 1993
10:45 a.m.

Before:

HON. MIRIAM GOLDMAN CEDARBAUM,
District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
DAVID KELLEY
RANDALL BODNER
Assistant United States Attorneys

-and-

AVRIL FUGGER
Paralegal

HARRY BATCHELDER
BRAD LEVENTHAL
Attorneys for defendant Massaro

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MR. BATCHELDER: Thank you. That is a good place, your Honor.

THE COURT: We will adjourn at this time, and we will reconvene at 9:45 tomorrow morning.

(The jury leaves the courtroom)

THE COURT: I have read the government's submission very carefully. I have not received anything from the defense.

MR. LEVENTHAL: Your Honor, with respect to the case law which was submited by the government, it is our position that the decision, from our review of the cases, is that of a factual determination by your Honor as to whether or not there is in fact has been prejudice in this matter.

It is our position that, after reviewing all of the facts with the Court and reviewing the letter of the government, that by far, there certainly was prejudice with respect to the untimely manner in which this evidence was disclosed to us and that the failure of the agents of the government — and I am not talking about the New York City Police Department, but the agents of the government when the government commenced a prosecution starting in 1991 after Mr. Esposito had in fact began cooperating with the government and entered a plea of

guilty, which was in 1991, that from that point on, the government's failure to disclose the existence of this bullet —

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THE COURT: It did not exist at that time to their knowledge.

MR. LEVENTHAL: It did exist.

THE COURT: Mr. Leventhal, you are not claiming, I take it, that the government's chronology is inaccurate. As I read their chronology, the turning up of the bullet was what you might call a fluke. I agree with you that the government's agents were not very good examiners of the car, because three times they searched the car and found in bullet. But I don't think that that is any evidence of failure to disclose. That is evidence of failure to find.

As I understand the chronology that was given to me — and nobody has given me any reason to doubt its accuracy — it was not the government at all that discovered this bullet, but the owner of the automobile who did not like the odor, who decided to actually, literally, take apart the upholstery and to remove the insulation, at which point a bullet fell out.

Do you agree that at that point you were advised?

MR. LEVENTHAL: Can I just respond to that briefly, your Honor?

THE COURT: Yes.

MR. LEVENTHAL: I would submit, it was not merely fortuitous that this owner of this vehicle discovered this vehicle. The government had been in contact with this

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individual. The Government agents had removed the carpet of this vehicle and had dislodged, according to the government, what they described as blood and maggots from this vehicle.

THE COURT: But you are not complaining about the blood or the maggots.

MR. LEVENTHAL: I think it goes hand and hand. As a result of this continued, albeit thorough investigation or search of this vehicle by the government, which ultimately led this individual to know that allegedly something had occurred within the car and that the government had now dislodged areas of the back of the car, and after that this individual then decided to take out the insulation, according to the government, this bullet allegedly became dislodged.

Again, it is my position, your Honor, and I don't know whether the Court will take the same position, that you

can't look at these individuals actions in a vacuum. You have to look at the individuals actions in conjunction with the actions of the government, and at the time that the government was engaging in these actions, they never bothered to let us know about it. That is one of my positions.

THE COURT: What would you have learned if the government had told you that, "We searched this automobile and found no bullet"?

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MR. BATCHELDER: If you found blood and maggots, I would have have been the first guy — that would start any investigator. If I had known that, first of all — and we are not faulting the government — the guys that knows about all of this, we won't even speak to that. That is another side. But if I knew there were blood and maggots on the floor of this car, I would have looked where he was and where he was placed and all of this. I would — if I had the opportunity to do so, because it is another person's car — have gone right down to the floorboard to try to find out.

THE COURT: Let me ask you this. When you received notice from the government that the owner had found a bullet,

did you make any effort to contact the owner?

MR. BATCHELDER: We got ahold of Mr. Kelley concerning the owner. He said the owner would not speak to us. We didn't do that until last week, until we found out about the bullet. David informed us that they didn't know whether the shell fragments were going to match up.

THE COURT: You have not answered my question. Did you make any effort to speak to the owner of the automobile?

MR. BATCHELDER: We don't know who he is.

THE COURT: You were not advised who the owner was?

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MR. BODNER: Let me set out the chronology. I thought it was set out. We didn't give the name of the owner. This is how the conversation went with Mr. Leventhal as to whether I would give the name of the owner. I told him that I would not give the name of the owner. We contacted the owner to see whether or not he was interested in talking to defense counsel. Our concern here was — and in no way do I want to imply that Mr. Batchelder or Mr. Leventhal would have intimidated this lay witness, but the facts of the case, whether the individual's name be given to defense counsel. He said that he

would prefer that his name not be given to defense counsel. What I said to Mr. Leventhal, was that any type of voir dire outside of a hearing — this witness would be available in a voir dire, if they wanted to take that position. That is the position I took with defense counsel. And I standby that, and I think it was a fair position in light of the witness' preferences.

THE COURT: Did you know who owned the car originally?

MR. BATCHELDER: The only person we knew who owned the car was Mr. Fiorito.

THE COURT: Wasn't it his girlfriend's?

MR. BATCHELDER: It was Ms. Brunjes'.

THE COURT: Have you ever talked to Ms. Brunjes

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about it?

MR. LEVENTHAL: Yes, I have, on up through and after the time that the government advised us through this time. Never once, and I only spoke to her, I think, on three occasions, never on any occasion was I ever advised that anything had happened to this vehicle because, in fact, she's in Florida and this vehicle apparently is in New York.

MR. BODNER: This vehicle was released to her, and she is the one that gave it to a dealer

to sell. She knew who she gave it to, and that person knew who they sold it to. And presumably, she received the money.

MR. LEVENTHAL: I think it is unfair of the government to make a large jump and assume, first, that Ms. Brunjes would know who her car was sold to, if she did, and based upon that assumption, to know that I would have contact to the people she —

THE COURT: You are jumping far ahead of me. I wanted to know whether you ever asked Ms. Brunjes what happened to the car.

MR. LEVENTHAL: Yes. It was sold.

THE COURT: You knew that the car had been sold?

MR. LEVENTHAL: I knew that the car had been taken and sold. That was it.

THE COURT: When did you learn that?

MR. LEVENTHAL: When I spoke with Ms. Brunjes.

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THE COURT: When was that?

MR. LEVENTHAL: I would say that would probably be sometime in August.

THE COURT: So you really learned at the same time that the government, that the car had been sold?

MR. LEVENTHAL: Your Honor, I was relying on forensic reports by the New York

City Police Department that had been turned over by the government, that there was absolutely no evidence in the car whatsoever.

THE COURT: So was the government relying on that, originally.

MR. LEVENTHAL: I am not faulting them for relying upon that, your Honor. The fact is that they are prosecuting the case. It is their prosecution. They took over the prosecution, or they commenced the prosecution, sometime in '91 or '92 against Mr. Massaro. They knew full well of the facts before any of this information was ever turned over to us.

THE COURT: Let me short circuit this. There is no question that this turned up by fluke. The question is whether the usual policy of establishing the truth is outweighed in this case by some impropriety on the part of the government. Isn't that right?

MR. LEVENTHAL: I don't think it is necessary for us to show that there was impropriety.

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THE COURT: But some compelling unfair result.

MR. LEVENTHAL: And the unfair result is, your Honor, that in the midst of our having developed over the period of a year, a theory of the defense and having opened before a jury and having commenced a theory and formulated

an entire defense theory around certain facts, that now in the midst of trial we are now forced to now backstep and try to circle around ourselves.

THE COURT: Wait just a moment. You opened to the jury that there is no scientific evidence that Joseph Massaro was present. This bullet has nothing to do with that; that is still your defense, that it was not Joseph Massaro, that he was not there. That he was not there is really your defense.

Then what we have is the testimony of Patrick Esposito. You were advised before you really did any substantial cross-examination of Patrick Esposito — certainly before you reached the murder of Fiorito — that this had been turned up. There is no reason in the world why you should have pursued, not that your client wasn't there, but something about a bullet.

I am not sure what it is that you did with Patrick Esposito that hemmed you in on this. What is it that you elicited from Patrick Esposito that prevented you, when I offered you a continuance to investigate this matter

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further, from taking it?

MR. BATCHELDER: Let me give it to you, your Honor.

THE COURT: Yes. What is it that you elicited from Patrick Esposito?

MR. BATCHELDER: If I may respond, we are out preparing the trial and we open on the fact that there is no scientific evidence, i.e., ballistics, in that car.

THE COURT: You didn't say ballistics.

MR. BATCHELDER: No.

THE COURT: I don't think the jurors think of ballistics, but that is neither here nor there.

MR. BATCHELDER: And that may be true. But on the off chance had I said scientific evidence and I say there is nothing in that car to connect it, maybe just maybe somebody picked up on it. And perhaps I was inarticulate, as I am often, but when the government stands here and I open on that, I daresay the jury is not going to forget that.

THE COURT: Let's assume that is true. What is the scientific evidence that has now been turned up that places Joseph Massaro in that automobile?

MR. BATCHELDER: Not only that it places Joseph Massaro in the automobile — and Mr. Bodner places his hand up, thank God he is not doing our defense work for us — but

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the shot, I was proceeding on the idea that it was not a second .38 that shot him.

THE COURT: Suppose it was or it wasn't. Suppose it was a single gun and there were two separate bullets as described by Esposito. The issue is still the same. There is no scientific evidence that Joseph Massaro was there.

MR. BATCHELDER: My position was this, and we were going to develop this through another expert, and we told you about the exit wound theory, that when Esposito said he took out the gun, screwed on the silencer and took a second shot and let him have it, I thought that that was absolutely impossible to do, because I believed that it was a smaller caliber weapon that fired the second shot that killed him.

THE COURT: I understand. And clearly you were wrong.

MR. BATCHELDER: And clearly if I am wrong, your Honor, I was put in that position because I relied on what I had.

THE COURT: Wait just a moment. That is not so. By the time the medical examiner took the stand, you already knew that a bullet had been turned up.

MR. BATCHELDER: Fine.

THE COURT: I would think, in any event, that you would want to inspect that bullet before you did anything,

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and that is what I offered time for.

MR. BATCHELDER: Perhaps, your Honor would have given us an 11-day continuance. And perhaps your Honor doesn't know how they work over there.

THE COURT: Just watch your tongue.

MR. BATCHELDER: I am not critical. I am just telling what your view —

THE COURT: I can hear you very well without sarcasm.

MR. BATCHELDER: I am not being scarcastic. What was done in the ballistics shop could have been done in 30 minutes.

THE COURT: I agree with you that they should have done that faster. But that is not the issue. We are now discussing whether the government laboratory should or should not have been faster. What I am trying to focus on is what is the prejudice.

MR. BATCHELDER: That shell matched the shell fragments found in his head.

THE COURT: So that is true. That does not place Joseph Massaro there. What scientific evidence puts Joseph Massaro at the scene?

MR. BATCHELDER: It is not just that he isn't at the scene, the subset of that argument, your Honor, was — and we were developing it in our own way — that the shot,

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the second shot was not the same caliber as the first shot. And why, because there's no brain matter. There's nothing in the car.

THE COURT: Maybe that was in your mind, but you certainly didn't present that to the jury.

MR. BATCHELDER: We did the best we could, your Honor.

THE COURT: You may be telling me that you planned to argue something else. But you haven't argued it to anybody. This upset your plan is what you are saying.

MR. BATCHELDER: Absolutely. Not it upset our plan. It upset our defense, yes. Upset our plan, no. The fact is we had had spoken to a person —

THE COURT: We are talking about prejudice. We are not talking about the fact that you cannot use a certain line of argument.

MR. BATCHELDER: Your Honor, I rely on the Court's judgment that a shell fragment found halfway through the trial which matches up with a shell fragment found in the individual's head is not

critical proof in this case. And if the Court finds that it is not prejudicial to us, so be it.

THE COURT: All evidence is prejudicial. I am trying to determine whether it is unfairly prejudicial, whether it is prejudice that the government should have

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avoided. Obviously, I would have liked — we all would have liked it — if the government agents had turned this up instead of the person whose car it is, after the government agents concluded there was nothing there. And you can make the most of that. You can raise a lot of questions about whether it was there in the first place.

MR. BATCHELDER: How can I do that if the shell fragments match up? Am I to stand before a jury and say they didn't find this for two and a half years —

THE COURT: Look, I am not here giving you advice on what you should argue. I am trying to evaluate whether the discovery of this bullet at the time at which it was discovered has unfairly prejudiced the defense, not whether it has made it more difficult for you to assert certain theories, whether it has unfairly prejudiced the defense to the extent I should preclude the truth.

MR. BATCHELDER: The truth?

THE COURT: Normally, the policy in a trial is to permit the truth. We preclude the truth in those circumstances in which there is policy that makes it unfair to permit the truth, isn't that right?

MR. BATCHELDER: Your Honor, I don't want to get in to a philosophical argument with respect to the Rules of Evidence and truth.

THE COURT: The purpose of the Rules of Evidence

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is twofold, to promote the truth and to preclude proof which violates some other major public policy.

MR. BATCHELDER: Your Honor, I am not up on that. I can only indicate from where I stand, I think we have tried to articulate as best we can our theories for you as to why this is prejudicial. I think we have talked about this at length. Your Honor seems unable to accept whatever we've said, so be it.

THE COURT: Unless there is some reason to know that the government deliberately failed to find this bullet or deliberately held it back. I cannot put my finger on anything that has happened in this trial that unfairly affects the development of the defense. You opened to the jury that there is no scientific evidence that

Joe Massaro was there. Is there a gun that links him to this bullet?

MR. BATCHELDER: It's the same gun — it corroborates Patrick Esposito's testimony.

MR. BODNER: There is no gun that we are offering.

MR. BATCHELDER: It corroborates Esposito's testimony.

THE COURT: Doesn't corroborate his story that it was Joseph Massaro, does it?

MR. BATCHELDER: Your Honor, I assume, as a logical proposition, that if it corroborates the fact that

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the same gun was used twice, okay — and we took a different theory based on the fact of the exit wound. I think that is pretty persuasive. I think we will hear about that during the summation by the government.

THE COURT: Suppose you had known it sooner.

MR. BATCHELDER: Had I known that it matched up and everything else? Well, the first thing I would have done was taken the bullets, as we have already, and found that they matched up.

And the next thing, I would have done was sat down with our expert, "What are you talking about this exit wound. We know there are two .38s and one of them is a 22." That is what I would have done, your Honor. Because when I spoke to the expert well before this and Mr.

Leventhal spent the better part of this, that the exit wound, no matter what the hired gun from the medical examiners offices that the exit wound was not consistent with a .38. Couldn't say that it was. And then I am sitting there with a head with shell fragments that don't match up. Nobody said it's a .38. We can't say, "But the shell fragments that are in it —

THE COURT: I understand what your expert is saying that gave you a wrong steer.

MR. BATCHELDER: No, based on what we knew, I would then have sat down and said, "What is it?" I would have tried to develop something around it.

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THE COURT: I offered you the time. I again offer you the time to do that. The first thing I asked you, whether you could have not pursued a number of these things was whether you wanted a continuance.

MR. BATCHELDER: Your Honor, from our perspective — and I don't want to belabor this, the hour is late and you've been most patient — we told you where we came from when we got that information. And the first thing, we got that information, we did not know that the shell fragment matched up.

THE COURT: I understand that possibility —

MR. BATCHELDER: As I say, an adjournment of a trial until such time as we found that the shell fragments matched up — I can't believe, but I know the Court —

THE COURT: Suppose that had happened. Suppose you had taken that adjournment. What is the difference in the position you would have been in vis-a-vis the defense?

MR. BATCHELDER: I would have been right in the face of medical examiner, what she testified, why she couldn't testify as to it was the second shot. I would have been all over her, most respectfully.

THE COURT: What good would that have done?

MR. BATCHELDER: Because I would have said to her when she got up and testified, "I don't know when the shots came. I don't know which one was first and which one was

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second"

Now you know because you got the shell fragments that match up that it is the what took place in the car. And I would have asked her a few questions.

THE COURT: I will permit you to recall her and continue your cross-examination.

MR. BATCHELDER: I would like that, your Honor. I would know on the basis of that development, and I would like to do that examination most respectfully.

We will be talking about it, Mr. Leventhal.

THE COURT: What I am pointing out to you is this, at the time of the medical examiner's testimony, the government didn't know there were x-rays or did not have the x-rays. They were told they didn't exist —

MR. BATCHELDER: Your Honor, they —

THE COURT: Wait a moment. Just a minute. I directed the government to inquire again at your request, isn't that right?

MR. BATCHELDER: Mr. Leventhal brought out the fact, in a rather skillful way, that x-rays were available. It was his expertise —

THE COURT: Not that they were available, but there had had been x-rays.

MR. BATCHELDER: Again, your Honor, the medical examiner's office and everyone who has ever tried a

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homicide, knows that there are x-rays that go along with respect to head wounds, that go along with it.

MR. BODNER: There is no issue that we did not know of the existence of the x-rays

because of the cross-examination of the medical examiner.

THE COURT: I directed the government to try again because they were told they could not find the x-rays. The medical examiner testified they were misfiled. She was unaware of them and she had not seen —

MR. BATCHELDER: Because she had not seen a report and had not looked at the report —

THE COURT: She was aware that there was a reference to x-rays. She said that she could not find an x-ray.

MR. LEVENTHAL: The problem, which I will submit is one that is compounded. What we have here is a situation where under a totality — if you want to use the term "totality of the circumstances" — we start out, we're speaking with our experts and reviewing with our experts, no x-rays and there cannot be a determination as to which shot came first. And during cross-examination, the medical examiner, lo and behold, x-rays are discovered. And the very next day, lo and behold, based upon an examination of these newfound x-rays we can now make a determination as to which bullet came first and which came second.

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THE COURT: Mr. Leventhal, if you are suggesting that there's any impropriety, that

is what I want to understand. Impropriety is a different matter.

MR. LEVENTHAL: I would because of that — but with these two gentleman, we are not going to do that. But if you look, your Honor, as the totality of the circumstances with a view towards prejudice, not with respect to their impropriety — I am not going to say that themselves acted improper, I don't think that they would withhold evidence.

THE COURT: When did you have the medical examiner's documents?

MR. LEVENTHAL: When did we have the medical examiner's documents?

THE COURT: For several years?

MR. LEVENTHAL: Before trial.

THE COURT: So you already knew at that point that there were x-rays mentioned in the report, is that right?

MR. BATCHELDER: We took them up with our expert, and we were never provided with x-rays.

THE COURT: Because they didn't have them.

MR. BATCHELDER: But there was —

THE COURT: It was your understanding that they were never produced?

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MR. BATCHELDER: Quite the contrary. The documents which I produced to my expert, he

looked at the documents given by the government. He looked at the documents and he said their seemed to be no x-rays.

MR. BODNER: And we were never specifically asked where were the x-rays. We didn't know they existed. And clearly the defense was, they existed, because we didn't know there were x-rays —

MR. BATCHELDER: That is rubbish. That is rubbish.

THE COURT: Please let's not get sidetracked. I am trying to set aside all of these rhetorical remarks and get to what we are talking about.

MR. BODNER: If they say that's not what happened. I withdraw that.

MR. LEVENTHAL: Your Honor, if you look at a holistic viewpoint, we learn in the middle of trial that that is an existence of x-rays that were misfiled, however, that happened. And now all of a sudden in the middle of the examination of this witness, that they — she can now make a determination of the existence of this bullet. And now the government will introduce that bullet which corroborates Patrick Esposito and corroborates the medical examiner. Your Honor, with all due respect, if that is not prejudice, there is none.

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THE COURT: The question, I repeat, is not whether there is prejudice. The question is whether it is unfair. This woman took the stand, the medical examiner, and said that she had not been given any x-rays. That the government had not produced any x-rays.

THE COURT: And I said to Mr. Kelley, you said we want those x-rays and I said to Mr. Kelley, "I direct you to try again to get those x-rays."

MR. LEVENTHAL: Absolutely. Not to try again — they never tried, apparently.

THE COURT: Just a moment, the representation to me when I said, "Where are the x-rays," that we were assured there were none available.

MR. LEVENTHAL: I am sure that, if they asked for x-rays and they weren't given over to them. They were not trying to withhold any x-rays. And the point is, your Honor, I am not pointing fault at them — when I say fault, I am talking about intentional withholding of evidence. The point is isn't it a little bit strange that for three years, nobody can find x-rays and x-rays can't be found, but overnight they can?

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THE COURT: If you are telling me you think you helped the government by insisting on their pursuing those x-rays, as it turns out, that's true, but that is not what you had in mind. That's just the way the facts fell.

MR. LEVENTHAL: It was unfair — that in itself combined with —

THE COURT: You understand the government appeared without the x-rays. I directed them to make another effort.

MR. LEVENTHAL: The entire turn of events as they unfolded had caught us with, in a situation where, I submit, and it's going to be — it's going to be this court's fault, is that what I submit and I think what Mr. Batchelder submits is that we are unfairly prejudiced because we have, as the case has progressed with evidence that we were not aware of from the time we were preparing our case, into the time we started our case, into the middle of our case, existed and developed.

As a result of all of these things all of a sudden being found, we find ourselves in a untenable position of being put behind the eight ball. We are, I submit, unfairly prejudiced. The government will say otherwise.

THE COURT: I am trying to assess it, Mr. Leventhal. I am trying to recapture. My recollection is

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this. That it was on cross-examination — it was not at the beginning of the trial. It was not before the trial that anybody said to me there is reference to x-rays in this report. We demand to see them.

It was on cross-examination of the Medical Examiner for the first time that you raised the issue of x-rays. She said she was not given any x-rays. Mr. Batchelder made an impassioned speech about wanting the x-rays. And I said to the government, I instruct you to go back to the Medical Examiner's office and find those x-rays.

I suspect from what the witness said that she was really the one who ultimately found them because she went searching through the place and she testified that they were improperly filed. That she could not — she did not find them with the file of this autopsy. That they were misfiled.

MR. LEVENTHAL: I'm not questioning that either. The whole point I'm trying to make, and I'm sorry if I'm not being clear, is the fact if you take that in conjunction with the next prong, that

being this late discovery of the bullet, altogether I think it adds up, maybe not individually, but I think together it adds up to unfair prejudice.

THE COURT: The x-rays would not even have been discovered if you had not requested them.

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MR. LEVENTHAL: Your Honor, the point of the matter is on cross-examination for the first time we learned —

THE COURT: You —

MR. LEVENTHAL: I learned there were x-rays in the case.

THE COURT: They were not referred to in the — in the report.

MR. LEVENTHAL: Not in the discussion of my expert, your Honor, when I discussed it with him.

THE COURT: How did she know?

MR. LEVENTHAL: I don't know.

THE COURT: My understanding was she said there was reference to x-rays. But that she didn't have them.

MR. LEVENTHAL: I reviewed that autopsy report and unless the government can point me otherwise — if they will, they will.

MR. KELLEY: I can explain it, Judge. The autopsy reported and all the papers that the government subpoenaed from the

Medical Examiner had absolutely no reference to the x-rays. In fact, when Dr. Lee testified on the stand that there were x-rays, I said to her, I must have missed something. Where is it? And she went to my papers and she said the papers you subpoenaed didn't have it.

I subpoenaed all evidence relating to the Medical

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Examiner.

THE COURT: What papers had it?

MR. KELLEY: There was a check mark on one of the worksheets she had in the file that said x-ray, and that was not turned over. And in all the time I had gone through with her she didn't have it. She found it and that's how we found out about it. We didn't find out until the cross examination. We subpoenaed all evidence relating to the autopsy. Twice we did that.

MR. BODNER: Judge, furthermore, the x-rays came in without any objections whatsoever by the defense. At that point when the x-rays came into evidence they were on notice, well on notice of the existence of the bullet having been found in the car, so these were strategic choices they were making. At all times they had all the information the government knew at that time.

MR. BATCHELDER: Was it strategic — to respond briefly to Mr. Bodner's statement about our strategic defense, was it a strategic defense when we put her up there and she is on cross-examination and we asked her what the x-rays showed and she came up with saying, I'm sorry. Now I know it is the second bullet. She wasn't speaking to us.

THE COURT: I thought that was disclosed to you before you pursued it?

MR. BODNER: It was.

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MR. KELLEY: We disclosed it the first thing in the morning. Absolutely.

MR. BATCHELDER: That's what I am trying to say. Why wouldn't we pursue it? We're stuck with it. My point.

THE COURT: You could have objected to the x-rays coming in.

MR. BATCHELDER: What about the search for truth that Mr. Bodner is speaking about? Are we supposed to say we have x-rays and we would not put them in? They would have put them in if we didn't put them in.

THE COURT: You could have objected on this ground.

MR. BATCHELDER: That she found them overnight? We aren't doing so well on the bullet. Is there any reason to believe that the

court, in the exercise of discretion, would not allow the x-rays in? Why?

THE COURT: Just a moment, Mr. Batchelder. You had not asked me to preclude the bullet yet.

MR. BATCHELDER: No.

THE COURT: I offered you a continuance to sort the whole thing out.

MR. BATCHELDER: Your Honor, I heard you offered us the continuance, and we are all aware of that. All right. We are all aware of that. With due respect, continuances in the middle of trial are to try and clear up

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methods that should never have arisen in trial. Assuming they can be cleared up.

Mr. Leventhal and I are taking the position, and we have argued this to you to a fare-thee-well, that we did not believe it could be cleared up by a continuance.

THE COURT: I understand. I am trying to sort it out because I am having difficulty understanding that, although I understand that this is evidence that is harmful to the defendant, but that doesn't mean that it is unfairly prejudicial.

MR. BATCHELDER: Your Honor, that is an intellectual approach. All evidence is harmful—

to a defendant. All evidence. All evidence. So that's not the issue. We all know that.

What we're saying, this specific set of circumstances that Mr. Leventhal and I have tried to lay out to you, we believe, is prejudicial.

The call is yours.

THE COURT: All right. You would like to preclude not not only the bullet but the matching of the fragments?

MR. BATCHELDER: Yes. As night follows day.

THE COURT: Suppose I were to receive the bullet and not permit the matching up of the fragments?

MR. BATCHELDER: We both have the same idol, it

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appears from something you said the other day. I am once again reminded of something that Judge Weinfeld said to me when I was an Assistant about trying to stand on two stools. You can't really straddle, he said, because you get the worst of both worlds.

THE COURT: You don't want that?

MR. BATCHELDER: No.

THE COURT: You don't want me to let the bullet in but preclude the match of the fragments?

MR. BATCHELDER: Your Honor, if you allow the bullet in, okay, you are going to allow the jury to speculate on something that really — we both know not to be the truth — we both know to be the truth. You are going to have to either, as Alexander did, you have to cut the Gordian knot or you are going to have to live with the Gordian knot.

If you allow the bullet in, they can say, the same bullet.

How many cars, your Honor, do you think have .38s in the floorboards discovered two years later? That's why when you say we can cross examine that they didn't find it for two years, give the jury some credit. we are sitting there and saying, by the way, you didn't find it for two and a half years, but it doesn't match up.

It doesn't make any difference. That is no

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examination, your Honor.

THE COURT: You are telling me that you would not even amelioriate your situation to preclude the matching up of the fragments?

MR. BATCHELDER: Your Honor, if you step back, if you step back and they are going to introduce the fact from this person

they will bring in that there were maggots and blood on the floor, why would — the jury can speculate on all kinds of things, and then we really would be in a spot, it seems to me. I don't think it would be fair.

THE COURT: You are not concerned about the maggots and blood on the floor? You are concerned about the bullet?

MR. BATCHELDER: Yes. I think the government will bring in the maggots and blood on the floor.

THE COURT: Are you onto that? I understood the motion to preclude to be with respect to the bullet and the analysis of the bullet and the fragments. I think I should at least get clear what the motion is for.

MR. BATCHELDER: I think your Honor has has a clear grasp on that, your Honor. I think you have to preclude the whole thing. That's what we are asking.

THE COURT: What do you mean by the whole thing? You have to be very specific now.

MR. BATCHELDER: When I say the whole thing I

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mean the maggots and blood on the floor —

THE COURT: I hadn't thought about the maggots and the blood on the floor. I didn't

even understand that was being offered.

MR. BATCHELDER: I am sure that will be offered.

MR. BODNER: First off, as far as the Crime Scene photographs that were made available from the very beginning of this prosecution, showed in the back seat that there was blood on the floor, so there is no disclosure problem as far as the existence of the blood in the back of the car. So that should not be part of any consideration before because they have been arid are on notice and have been for quite a while of the existence of blood in the back of the car. So to me that's completely, should be out of the discussion here.

THE COURT: What do the maggots add to that?

MR. BATCHELDER: Age, your Honor.

MR. BODNER: Age and the timing of the age of the — it explains the smell of the maggots and the existence of the blood explains how this person came about to rip out the insulation to begin with.

Furthermore, Judge, as far as keeping out the ballistics test, it is our position that that would open ourselves to the cross examination by the defense or even indeed, the speculation by the jury that this is not

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indeed — that somehow the government planted the bullet there or this person for whatever motivation he might have, planted the bullet there, because it was only found two-and-a-half years later, when we all know that that is not the fact when the ballistics match up with the fragments in his head.

Therefore, we think it would be, as far as seeking the truth, a disastrous result to allow the discovery of the bullet on Labor Day to come in without matching that bullet with the fragments found in the victim's head.

THE COURT: The real difficulty is you explicitly advised that they had told you they could not match it up.

MR. BODNER: No, Judge. It was not — not that at all. What we advised them, there was a shell casing found in the back of the car that was disclosed very early on, which is somewhere — we are somewhat surprised that the defense took the position there was never a second shot in the car because indeed, there was a shell casing in the car from a .380.

What ballistics told us was that they couldn't match the shell casing up with the bullet that was found.

We never took the position that there would be no ability to match the fragments in the head with the shell that was found. That is apples and oranges.

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MR. BATCHELDER: Once we got to the apples, you know, once we got to the shell casing, we can't match it up to the bullet, then you know it is a different horse race. This is not an easy question.

THE COURT: I understand.

I try not to spend as much time on questions.

MR. BATCHELDER: You have been most patient with us.

MR. BODNER: Judge, is there anything you would like us to add to our letter?

THE COURT: Your letter stands on its own and I have tried very hard to parse it out. And I don't think that the courtroom can insulate against the surprises that happen in life. I have no evidence here of any intentional misconduct on anybody's part. I have no evidence that the defense has committed itself to an untenable position before the jury.

I will give you an opportunity to further cross examine the Medical Examiner, if that is your desire.

MR. BATCHELDER: We would also like, your Honor, the ability to cross examine the Crime Scene people who searched the car.

THE COURT: I will permit that as well.

MR. LEVENTHAL: We also would like the opportunity to voir dire this civilian individual, who

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supposedly finds this bullet, outside the presence of the jury since we haven't had any opportunity, there are certainly no 302s on hand, certainly no discovery on hand. It would at least give us an opportunity to see where he is going before we get before a jury.

THE COURT: Well, I understand. I can't compel him short of a subpoena to talk to you in advance. But the government could facilitate such arrangement.

MR. BODNER: We could — or we have no objection to a voir dire of this individual.

THE COURT: In advance of testimony?

MR. BODNER: In advance of testimony before the jury as to any impropriety by the government. I mean, it shouldn't be sort of a practiced cross-examination of materials, but as far as any inquiries of any impropriety by the government, we have no objection whatsoever of a voir dire along those lines with the lay witness. We

subpoenaed him and we anticipate he will be here to testify tomorrow.

MR. LEVENTHAL: We would like to able to explore the circumstances under which this was recovered.

THE COURT: I understand that. That's what we're talking about. I will provide for that as well.

MR. BODNER: Nothing further for the government, Judge.

THE COURT: That is my ruling.

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MR. LEVENTHAL: So we are clear, your Honor, is it your ruling now that both the testimony with respect to the bullet being found, the ballistics matching up to the fragments in the head, and the blood and the maggots will all come in?

THE COURT: The blood and the maggots and the findings of the bullet, I will give you an opportunity to voir dire. Obviously, if something unusual comes out on voir dire, I will reconsider.

Is it correct that you have known always that there was blood?

MR. LEVENTHAL: We knew from a review of the Crime Scene, of the forensic photo, the Crime Scene photo of the vehicle and the Crime Scene forensic report of the vehicle that there was blood

on the top of paper in the back seat where the head of the deceased was lying.

Did we have disclosure of the fact that there was blood underneath the carpet and maggots underneath the carpet? I'm sure maggots developed later on, but blood underneath the carpet, no, we had no knowledge of that. It was not contained in any report. Apparently the Crime Scene didn't do any extensive investigation.

THE COURT: I understand. I myself am amazed about how little they dug into.

MR. LEVENTHAL: We are not advised of that. I

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will be quite honest, your Honor. I would try and impose upon the court to consider leaving that out.

MR. BODNER: Judge, the photographs show blood in the black of the car. Furthermore, it shows the face of the victim.

MR. LEVENTHAL: Not in evidence.

MR. BODNER: It was in discovery. Absolutely covered with blood. Absolutely covered with blood. So two and two equals four.

THE COURT: If there is evidence there was blood two and a half years later, why do you need the maggots?

MR. BODNER: We don't. The only point is there was a smell in the back of the car that led this individual to rip it out.

I will instruct him, other than the voir dire, obviously, but before the jury not to mention the existence of the maggots for what it is worth.

MR. BODNER: I don't know what difference the maggots make to you. I don't think the blood you can avoid.

MR. LEVENTHAL: The blood I have to live with.

THE COURT: I will preclude the maggots if that's of similar concern to you. And you will have an opportunity, in effect, for limited discovery by voir dire outside the presence of the jury of the way in which the bullet was found, and the Crime Scene people.

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MR. BODNER: Judge, there is one thing I want to put on the record. I informed Mr. Leventhal that in putting together the letter rather quickly, one thing I left out but I did apprise Mr. Leventhal when the Task Force individuals went for the first time to find the car in August of this year and they took out the back seat, they in fact found a surgical glove in the back seat.

We have absolutely no intention of eliciting that or putting that in evidence. Indeed, it is consistent with the — we don't know whether

it was from the EMS, but nevertheless it is consistent with the testimony of Patrick Esposito that he was wearing surgical gloves.

THE COURT: That will not come in.

MR. BODNER: Absolutely not.

MR. LEVENTHAL: The reason I had this discussion with Mr. Bodner prior to coming into the afternoon session, and I didn't raise it because he said he was going to. He is a man of his word. I didn't want it to appear that I was trying to take unfair advantage by saying they didn't do this either.

What I have to say is this, your Honor. In tandem with my entire argument of this, the entire matter of the investigating organization with respect to the disclosure of this material, as well as the manner in which bits and pieces of evidence or bits and pieces of

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information have been disclosed to the defense in a, what I would certainly say is not with all deliberate speed to any extent of the imagination.

They found a bullet and they say that we don't know whether or not it will match anything.

Eleven days later we learn that it does.

They find a — the investigators tear apart a car a second or third time and they don't bother to let us know that they have done any of that.

They find a surgical glove. True, they don't intend to use it, but they don't bother to let us know about any of that.

MR. BODNER: Which would only corroborate the government's case.

THE COURT: I understand. I understand. We are now getting to the point of diminishing returns.

MR. BATCHELDER: We have one request. We would like to know exactly where the bullet was found in the car.

MR. BODNER: I have actually discussed this with Mr. Leventhal before, but what happened was that, as I understand it, as he was ripping out in the back, he removed the front seat, and as he was ripping the insulation apart —

THE COURT: Are you talking about on the floor?

MR. BODNER: On the back floorboard.

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Again, we will have the witness for voir dire to nail this down.

My understanding is near the back transmission hump toward the driver's side in the rear of the car, as he was ripping across that insulation, exposing the steel of the floor, he

heard a ping drop out as he was tearing the carpet from that area. He looked down and that's where the bullet was.

THE COURT: You are talking about in front of the back seat?

MR. BODNER: No.

THE COURT: Was it under the back seat?

MR. BODNER: It was in the — again, he didn't see it physically drop from where it dropped out.

THE COURT: He heard it.

Where exactly was that?

MR. BODNER: I think it is better if the witness testifies, but my understanding of where it was was the area of the back seat floor, carpeting behind the driver's side and near the transmission hump in the back.

THE COURT: I understood that, near the transmission hump.

What I'm asking you is how far back — that is, this is an area where the feet sit normally. Is it where the feet would sit or under the back seat?

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MR. BODNER: I believe it was sort of in between the two.

THE COURT: It is in front of the back seat.

MR. BODNER: Correct. Absolutely correct.

THE COURT: That's all I was trying to visualize.

It is somewhere between the back seat and the front seat.

MR. BODNER: Exactly.

THE COURT: Near the transmission hump.

MR. BODNER: That was the area he was tearing apart. He didn't actually watch it drop out.

THE COURT: I understand. He was pulling out the material.

MR. BATCHELDER: Is it from the pool of blood area?

THE COURT: Where was the blood and the maggots?

MR. BODNER: He was working in the area — he was trying to rip out the insulation in the area where the blood and maggots were because he wanted to get that out in order to get rid of the smell, and he was working in that area.

We have produced the videotape, by the way, that was made after the bullet was found, in some way trying to recreate what happened.

MR. LEVENTHAL: I just want to make one further inquiry and then I will make a request, so the record is clear.

[3458]

First, is there any information with respect to any holes in the carpet or any holes in any part of that area of

the back where this bullet was recovered?

MR. BODNER: Again, that's in the videotape. There was a hole that was found in that area.

MR. LEVENTHAL: That's in the videotape?

What I would specifically request now, since now we are on notice of the facts, we have been on notice but since we have been having this discussion that there was a second or third attempt by investigators to locate a bullet, to search the inside of the vehicle, we would request any and all reports that were prepared by anybody with respect to these actions.

MR. BODNER: Judge, I don't think there are any reports, but we will definitely —

THE COURT: Don't think about it. Find out.

MR. BODNER: What I was going to say, I am not aware of any reports. Let me say it that way. And we will inquire of everyone involved whether any reports were made. And if so, we will produce them.

THE COURT: You will ask everybody to search their files?

MR. BODNER: Absolutely.

THE COURT: I think that is the fairest resolution. And I so rule.

[3459]

MR. LEVENTHAL: Exception.

THE COURT: Of course, you have made your position clear. You don't need an exception under the Federal Rules, as you know.

(Trial adjourned to Thursday, October 7, 1993 at 9:45 a.m.)

UNITED STATES VS. MASSARO

COURT OF APPE. LS ROOM 1705

JUSTICES: JACOBS, ALTIMARI & CALABRIZZI

THURSDAY APRIL 20, 1995

POLLACK: May it please the court, my name is John (?) Pollack and I am appellate counsel for the defendant, appellate Joseph Massaro.

CALABRIZZI: You were not trial counsel?

POLLACK: I was not trial counsel. We regress each of the points raised in the brief today and wish to argue three issues as time before the red light allows. First, we'd like to argue that the trial court erred in refusing to grant the defendant a mistrial.

CALABRIZZI: Now that's the one that interests me and that point is very troublesome to me. Tell me, you know, we all know, they were holding the bullet in their vest pocket. You made, someone made a comment, you know, there's no scientific evidence that connects and the government sits there on their hands. I understand that. There came a time when you did know though about the bullet and we'll get an opportunity to cure it to the extent of a continuance etcetera. Now, why should I remain angry under those circumstances?

POLLACK: Well, I think the test is: Was there substantial prejudice when the government, as you said, Your Honor, "sat on their hands" and it's evident the case is a — pretty clear. Well, the defendant, first of all,

was led down a primrose path. It wasn't clear — the bullet was found before trial, disclosed after the opening, after the defendant who was —

JUSTICE: Committed itself.

POLLACK: Committed itself one way. But they didn't say at that point, hey, this bullet ties your client —

CALABRIZZI: How much time?

POLLACK: Two weeks, Your Honor, and during those two weeks —

CALABRIZZI: Two weeks between what? Two weeks between the time they knew that it tied, that time or two weeks between the time that they found the bullet and the time they —

POLLACK: No. Three weeks between the time they found the bullet prior to trial, immediately prior to trial, and the time that they got the ballistics report which tied everything together, which completed the circle. Intermediate of that. So they found the bullet, five days later, after the opening, they disclosed it. So they knew.

CALABRIZZI: They delayed five days from finding the bullet to telling you that they had a bullet and they were going to do some tests?

POLLACK: Correct.

CALABRIZZI: So, at that point you were on notice that something might happen with respect to that bullet?

POLLACK: That's exactly right, Judge Calabrizzi, and he went forward at that time and examined the crime scene — finished his cross examination of the government's chief witness.

JUSTICE: And you could have — could you have asked for a continuance at that point?

POLLACK: No. We did not.

JUSTICE: I know you didn't —

POLLACK: Not me, the trial —

JUSTICE: The trial lawyer. But could you have asked for a continuance and said, "Look, there's this bullet and we don't know where it's going to come out. It may come out our way, it may come out the other way, but the one thing we don't want to do is go on with the trial based on the absence of a bullet when we know it's there."?

POLLACK: I think he could have and I think the trial judge at some time during that period, or close to the decision, close to the time that the test came back, offered a continuance. There's no question about that —

JUSTICE: All right, Counsel.

POLLACK: — but the milk had been spilled.

JUSTICE: Counsel, Counsel, Counsel. Let's assume I'm terribly upset with the government, which I am, but let's assume that the government understands only one word and that's reversion, not reprimand. Okay, let's assume further anything that you want to say about this case is right. All of

it went to credibility; didn't it? Did it go to the —to anything other than credibility?

POLLACK: It went to — of course it went to credibility. It went to credibility —

JUSTICE: Your argument was that Esposito did the murder himself: correct?

POLLACK: Exactly right.

JUSTICE: Now, how does this relate — how do — how do you connect the opening statement which is, there is no scientific evidence connecting my man with this crime, with the bullet?

POLLACK: Because the scientific evidence and the finding of the bullet so enhances Esposito's credibility that in fact it gives the government a smoking gun and I think that's what counsel was referring to.

ALTIMARI: How does — How does —

POLLACK: There was no splatter, Judge Altimari, there was no blood on the front seat. Here's a man — Esposito had testified that the defendant, Massaro, had carried a bloody body spurting blood upstairs, up the stairs, into a garage, placed it in a car and yet the seat which he claimed Massaro was sitting in, in the car had no blood. He claimed that that second shot that was fired in the car, yet, there was no splatter on the back seat. There was no blood, there was no splatter. This bullet discovered three years — going back three years —

CALABRIZZI: All right. Look, let me — nobody is going to be upset with the three year business

because that was a state problem and I'm not concerned with that. Go ahead, move on.

POLLACK: So they were prejudice in a number of ways. Yes, he had to proceed after he got word that there was a bullet. Do you know that the government's initial letter of disclosure they said —

JUSTICE: I have it from a different problem. I mean, prejudice does not mean that the evidence which was admitted was harmful to the defendant.

POLLACK: Of course.

CALABRIZZI: Now, the presiding judge has asked was it harmful to the defendant that — that isn't what prejudice is. Prejudice has to do with the fact of these four or five days delay, of course, that the delay prejudiced the defendant. Now, what I want to know is why wasn't the bulk of that prejudice met by the trial court when it offered a continuance? When it did all of these things which at the time, your client, not you, neglected to or decided not to go forward.

POLLACK: In other words, what your asking is, what was the substantial prejudice, not did it hurt him. Of course, it hurt him. The substantial prejudice is three fold, Judge Calabrizzi. First, his theory of defense attacking Esposito using the absence of scientific evidence was destroyed. Two, his trial counsel's opening to the jury setting forth there is no scientific evidence

because he was relying on the prior discovery, was destroyed. So the credibility of the counsel in talking to and assessing the jury was destroyed. And three, and perhaps most significant the defense counsel's cross examination of Esposito and the crime scene, and particularly the medical examiner ended up assisting the government because he had no choice. He was locked in to this mode because it was his argument that he pressed the medical examiner, Judge Calabrizzi, as to which bullet came first because — and which bullet came second. Esposito had testified that the — obviously, that the shot in the car came second. There was no scientific evidence to show that. There was no, as I said earlier, no splatter, no blood, no fragmentation, no —

JUSTICE: Counsel, did this testimony take place during the four days between the time that the bullet was discovered and the time they told you of the bullet or did it take place between the time that they told trial counsel, I'm sorry, of the bullet and the time that the bullet was linked scientifically? Did it take place after your client was on notice and could have asked for a continuance and stopped the whole thing?

POLLACK: It was on — It was the latter Judge, but my point is —

JUSTICE: It was the latter?

POLLACK: Certainly it was the latter. It was in that two week period that they were conducting their test. But if you look at the discovery letters which are part of —

JUSTICE: Then wasn't what your client did by not asking for a continuance to create a situation in which he could have it both ways? If it turned out that the scientific evidence showed that this was not a bullet that was linked then he had made all sorts of arguments and he could come in and he could say, "Hey, here's a bullet that supports my argument," and so on. And if instead it turns out as it did, that the bullet was linked, he could come in and say, "Terrible error, mistrial. Go back. Let's start all over again."

POLLACK: I don't think so.

JUSTICE: Why should we create that situation even if the government behaved appallingly — I mean completely with the presiding judge in not letting you know during those four or five days, but why should we worry about what happened after the four or five days?

POLLACK: Well, because I think he had a right to rely on the first letter that the government wrote after disclosing the bullet, that there was no way — that they had been advised by law enforcement experts that there was no way that the bullet could be linked to a particular gun or shell casing. And so he took that risk that the trial judge would have because it wasn't a link

and because it came in late and because if you apply the rule of Stevens in this circuit, and Wicks in (?) circuit, then the judge wouldn't allow this in and when the judge decided to allow it in, then of course, he had to make a mistrial. But he was absolutely committed because of his opening — to a course of action. Otherwise, he might as well have had the — I think — I think the emphasis is being put on the wrong —

JUSTICE: How long was the trial?

POLLACK: The trial was months.

JUSTICE: All right. Now, all of this that we're talking about happened early on.

POLLACK: But it was at the crucial —

JUSTICE: I understand. Except, there came a time when the judge said, "You can have a continuance. You can have this, you can have that." You said, "No. I'm gonna play it, you know, I'll get two cracks at this apple." You see, th: 's what's troubling me.

POLLACK: But we were not the party at fault here. Why —

JUSTICE: You could —

POLLACK: Let me put the shoe on the other foot —

JUSTICE: You could have minimized the culpable conduct on the part of your adversary. You could have done that and still tried the case and got a fair trial.

POLLACK: But let's assume we asked for a continuance.

JUSTICE: Yes.

POLLACK: Let's assume for the moment that the judge gave us a week or two weeks —

JUSTICE: Right.

POLLACK: — as this court suggested in Dewy (phonetic), Kelly or any of those cases. And let's assume further that the result came back as it did.

JUSTICE: Yes.

POLLACK: We're in the same posture, now you got —

JUSTICE: No. You get a jury charge from the judge. The judge looks at the jury and says, "Ladies and gentlemen of the jury," and she says what she says. Whatever has to be said to cure the situation.

POLLACK: But isn't it time for this court to say to the government, as you suggested earlier, "When you do something like this — why couldn't the government say we found this bullet. Let's before defense counsel opens, before we let him go down the guided path, before we suggest any present, why can't we just —

JUSTICE: Your basic argument is that the defense counsel's opening statement was so crucial to the whole defense that the fact that it was made at a time when the government knew that it had a bullet and you did not, was sufficient to be reversible error and

that we should go back to teach the government a lesson.

POLLACK: That's part of it. But it's not just the opening statement. It's a concept that encompasses the defense attorney's credibility. It encompasses the defendant's ability to go forward on a defense that he — this is not a case that started two weeks before.

JUSTICE: As I understand it, the theory of the defense is that nothing the jurors would hear would link your client with the murder of Mr. Fiorita; correct?

POLLACK: But for — but for the testimony of Patrick Esposito.

JUSTICE: Exactly. And by the time you got that bullet, that it can be linked to your client.

POLLACK: But it's linked almost as directly as it can because it so strongly corroborated Esposito, who was shown to be a liar in all other things. Here, in this very instance, in this critical count, the count that blew the maggots in this case, it so bolsters Esposito's testimony as to be as good as direct evidence.

JUSTICE: If the issue is the credibility of a witness not the credibility of counsel, couldn't that have been cured by having the court say to the jury, "Ladies and gentlemen of the jury, if there seems to be some inconsistency on the part of trial counsel, that is due to the government's willful holding back of evidence." You know that the court can say some things if you ask

it which will make the life of the government be darn difficult and make your counsel look good, but that wasn't asked for either.

POLLACK: I agree. I don't think it was our obligation. The court certainly didn't offer to do that kind of a charge and I will certainly stand corrected by my worthy adversaries, but I don't think that was — it certainly would have long way but I don't think it would have undone the terrible damage that occurred. You know, some people say first impressions are lasting impressions. But in the end —

JUSTICE: Your main cross is going to be that the government did something really disgusting that affected the beginning of the argument and that that's enough. That's the beginning of your argument, but that's enough.

POLLACK: I think, Your Honor, if you weigh the criteria set forth in Wicks, and set forth in Stevens and it's cases, I think that you will find that the time has come to say stop doing it.

JUSTICE: I know. I understand your position.

POLLACK: Okay. And I'll read my rebuttal hopefully after my (?)

KELLY: May it please the court, my name is David Kelly. I'm Assistant United States Attorney for the Southern District of New York. I represent the government's appeal as it did at trial before Judge Cedarbaum. There's no question, Your Honor, that there

wasn't any delay. I should have turned that bullet over the moment it was discovered.

JUSTICE: Why didn't you?

KELLY: Your Honor, I have a good excuse. I can explain my thinking, which I don't think carries the debt. It should have been turned over. My thinking at the time, Your Honor, was that this was three years after the incident. There had been several searches of the car conducted since then for forensic evidence. Each one of which was of negative results. The car had changed ownership and our forensic experts, once we found this piece of shrap metal, had said initially that a match could not be made. In view of that it looked as though it was irrelevant to the case and that —

JUSTICE: That's a judgement that somebody else should make, not you.

KELLY: Absolutely, Your Honor, and in retrospect —

JUSTICE: You say you should have — you make it very difficult to become annoyed with you or angry with you only because you bang your chest and say you had culpable, you had culpable (?) and you have a right to do that, banging your chest.

KELLY: That was very —

JUSTICE: This is a terrible, terrible thing that happened here. You cannot play games. A lawsuit, a criminal lawsuit, is not a game. It's a search for the truth.

KELLY: It is, Your Honor, and I —

JUSTICE: Now, please address, having said that, it's not my purpose to embarrass you. Having said that, tell me why, after committing this — what I can only describe as an ogresious act on the part of the government — why this did not commit the defendant to a position or a strategy from which he could no longer retreat?

KELLY: I will direct that. First, Your Honor, I should — I think it's important to note it was ogresious, however, there was no bad faith and in fact at the time it occurred, the defense attorney expressly expressed on the record there was no bad faith by the government.

JUSTICE: You see, there's something on record that's trouble — you know, sort of not clear. There came a time when I think you communicated the bullet to your adversary in an informal way; is that correct?

KELLY: Yes, Your Honor. We discussed it with —

JUSTICE: When was that?

KELLY: I believe, Your Honor, that the opening was on Tuesday, we had this discussion I believe on Friday. It was formally advised by a facsimile letter the following morning, Saturday. What happened was, at that point in the trial the only witness, the key witness, the accomplished witness had testified, Patrick Esposito. He had just begun cross examination at the time that we disclosed it to the defense. The cross examination had gone no farther than of

his prior bad acts and had not yet touched upon anything having to do with the charges in this indictment. Nevertheless, Your Honor, the defendant proceeded with trial for twelve days during which time the accomplice finished his testimony on cross examination, the forensic experts testified, the medical expert testified.

JUSTICE: Then he had made an opening statement?

KELLY: He had, Your Honor. Now, the opening statement is obviously important and he places great weight on that. In the opening statement what he said, in sum, was that there is not one shred of scientific evidence that can match my defendant to this car or to this murder. That statement was as true when I disclosed the bullet as it was at the time he made it. What that bullet did was to corroborate Esposito as did substantial other evidence that he ignores. What he ignores is, is that there is a shell casing in the car. Now, there is testimony by the forensic officer that the shell casing is discharged from a weapon when it's fired. Clearly indicating that there's an enormous possibility that there was a shot fired in the car. In addition, the medical examiner testified that while there was a shot at close range that doesn't mean that the skull or flesh needs to be splattered about the car. Nevertheless, the defendant forged ahead with his argument on cross examination that because there was no splatter —

JUSTICE: Go back to the opening statement, your claim is that there was already evidence of which the defendant was aware which if this bullet would be inconsistent with the opening statement would also have been inconsistent with the opening statement, is that your part?

KELLY: Your Honor, I'm sorry. I'm not sure I understand the question.

JUSTICE: You said that there was a casing, that there was other evidence.

KELLY: Yes, Your Honor.

JUSTICE: Okay. And that the opening statement counsel said, counsel for the defendant said there isn't a shred of scientific evidence linking the defendant to this murder.

KELLY: Yes, Your Honor.

JUSTICE: And are you saying that this other evidence, of which defendant was already aware was scientific evidence linking him to the trial,

JUSTICE: Or if it wasn't the bullet wouldn't do so any more —

KELLY: It was not, Your Honor. The other scientific evidence corroborated Esposito's recap of the murder. The bullet did not draw this defendant to this crime any more than the other evidence.

JUSTICE: Okay.

KELLY: That bullet simply was thrown on to the pile of that evidence which already was there which he knew about which

corroborated Esposito's account. I should also say in response to my adversary concerning Esposito's credibility, Esposito testified as to every key element in this expansive indictment the jury convicted on each and every account and acquitted on one sole predicate. Many of those accounts relied extensively on Esposito. But in addition to the evidence that Esposito contributed to the case concerning the murder there is substantial other evidence. For instance, Mr. Pollack mentioned the fact that Esposito said there was no blood on the front passenger seat. Well, the defendant well knew that there was no blood on the front driver seat where Esposito was, despite the fact that the jury had in front of them the blood-soaked clothes that Esposito was wearing at the time he committed the murder. In addition, Your Honor, there was at the time of the search of the house where the first shot was fired a search conducted and the jury had photographs that clearly shown in the blood, in the blood sills, two sets of foot prints. And moreover, setting aside from any sort of forensic evidence, there was several other witnesses who testified concerning the murder. For instance, a confession by the defendant Massaro to his acting boss at the time of the Luchese crime family that yes, I killed this person. There is two other witnesses who testified that Massaro had stated to them that Fiorita, the victim, had caused him a problem and that in fact he made

threatening statements that would suggest that the killing would be very likely.

JUSTICE: Are you claiming that all this was harmless error? Is that what your saying?

KELLY: What I'm saying, Your Honor, is that there is not substantial prejudice particularly in view of this tactical decision not to try to mitigate any sort of damage that might have been caused by my delayed disclosure. You didn't — you didn't see a continuance in fact, Your Honor, I think it's noteworthy that he said that he would not bring in a notion, he didn't know what might happen with the ballistics.

JUSTICE: But how are we to hold the government to a rule which is as important as this one if we don't do something as dire as reverse? This is the essence of the presiding judge's question when he said, "The government doesn't seem to understand any word except reverse."

KELLY: Your Honor, I think the rules already are in place. If this was a grave violation and there was bad faith, there would be reversal. If this is a Rule 16 case and if this court were to find substantial prejudice, then the issue is reversal and I think that is the appropriate measure in a case where there is substantial prejudice. That is not the case here, Your Honor. I think there is overwhelming evidence that points in the other direction that there was not substantial evidence and I think that it's even increased by his tactical decision not

to go forward. And what I was saying a moment ago concerning the ballistics report, he stated on the record, "Your Honor, I don't need a continuance to the ballistic report because I fully expect it's a foregoing conclusion that, to me, that that ballistic test is gonna come back as a match." So he knew that, yet, ignored it and proceeded with that defense without seeking a continuance, without waiting for the ballistic report. And I think it's very keen of Your Honor's observance that he's seeming to have it both ways. Well, let me try to see what I can do here and I failed and now I'll back up and try to recoup it and come back and say substantial prejudice. I don't think he should be permitted to have it both ways. He was given ample opportunity by Judge Cedarbaum to try to take a closer look, to mitigate any possible prejudice. He chose knowingly not to do that.

JUSTICE: At the trial, how did the defense counsel account for the presence of the shell casing?

KELLY: Essentially, Your Honor, I believe it was something he just tried to ignore, and there was — I believe, Your Honor, I'd have to go back and fully search the record, there may have been some questions on cross examination that suggested that it could have gotten there by falling out of someone's pocket, for instance. The testimony of the forensic officer though was that a bullet, a shell casing like that

typically is discharged upon the firing of a weapon.

JUSTICE: But typically, is it evidence that that shell casing had been chucked off the bullet at the time that it was fired?

KELLY: It's not possible to make a forensic comparison between a particular shell casing and a bullet to say it came from the same casing. There was evidence, however, after ballistics that that shell casing was indeed a certain caliber and that that bullet was likely to be of the same caliber. So it's not a definite match, but one strong suggestion that yes, there was a match.

JUSTICE: The bullet came from a particular gun. Is that gun in any way linked with Mr. Massaro?

KELLY: The gun was never found, Your Honor. Only — what was found was — the fact that his testimony the guns immediately after the shooting was given to an accomplice, Joseph Kern, who had picked up the defendant and Esposito after the murder. So, we never had the gun. What we did have was shell fragments from one wound and then we knew that there was a second wound that had passed through the head and left, exited him. Your Honor, in view of all of this clearly the disclosure, the delay was undue. However, all of the factors, first off that the statement he made during his opening statement was no less true when he made

it than when the disclosure was made. He did not seek to go back and ask to reopen it, he did not seek an instruction, as Judge Calabrizzi suggested might be appropriate by instructing the jury that this was not proper and directed its comment it should not reflect upon the defendant. He did none of that. He proceeded with some of the most crucial witnesses in the case. The accomplice, he went after the discovery of the bullet and cross examined concerning the details of that. He went ahead and cross examined the forensic experts who investigated both scenes, where the body was discovered and where it was allegedly shot. And he went through and cross examined the medical examiner. Never once, never once making one peep about the bullet or when it would be that it might receive the ballistics examination.

JUSTICE: You don't — You don't consider the possibility that counsel who has in a major case planned a whole strategy and is — has begun their strategy is suddenly confronted with the possibility of new evidence of this sort and instead of making a cool and collected tactical judgement, simply makes a mistake at that point not to ask for a continuance because after all it's in the middle of a trial and there's a certain of pressure both ways and then as a result of that what you now concede is the most important evidence in the trial comes in. And that this was a tactic that it was just somebody that got put in a tough situation because of your mistake.

KELLY: That's not the case here, Your Honor. It's not the case because I frankly suggest to you that that defense could not have flown in the face of all the other evidence that corroborated Esposito. The shell casing, the blood in the footsteps, the blood in the car, the testimony of medical examiner concerning splatter and so forth. It just wouldn't have flown. And the bullet that was later recovered was only consistent with that. It wasn't something that threw up a whole new avenue or threw up a whole new face to the case it was consistent with the government's theory that it was — and the other evidence that already was there, was completely inconsistent and refuted the defendant's defense. And I also should suggest to you, Judge, that while this was a lengthy trial indeed, this was not the middle of the trial it was very early on. There was one witness, an organized crime expert who just laid out some general (?) then the accomplice testimony of Esposito and the cross had begun for a very brief period before he concluded for the weekend. Not once, not once touching upon anything having to do with the charges in the indictment. It was very early on, had the defense sought — had the defendant been troubled by the delay, had the defendant thought of some sort of bad faith, surely he would have turned to the judge and cried foul. Not only did he not do it when we resumed on Monday, he did not do it for twelve days, trying to take some sort

of tactical advantage in the meantime. For that reason, coupled with the fact that there's no substantial prejudice we think that Judge Cedarbaum acted properly and well within her discretion by admitting the bullet and denying the defense motion for a mistrial when he made it long down the road. Your Honor, the remaining issues defense has now argued, I will rest on my brief unless there are any questions concerning those briefs.

JUSTICE: Right. Okay. Counsel, tell me why should you have your cake and eat it too?

POLLACK: Well, I think we should have — I don't view it as having our cake and eating it too. First of all, as Mr. Kelly has indicated when he stood up here, he indicated to counsel that there was no way when counsel was initially informed after his opening — he informed that a match could not be made with respect to that bullet. It further exacerbates the problem. If —

JUSTICE: What takes counsel so long to become moved to the point where he moves for mistrial?

POLLACK: Only when that came in, only when in fact it was two weeks later determined that a match indeed could be made that it indeed was gonna come in, then he moved for the mistrial. That was appropriate. How could he move for a mistrial with no —

JUSTICE: The offense took place at the time he knew that the bullet was in possession of the government and that he was about to

connect — that he had statements in opening remarks. That's when the offense took place. There should have been something clear on the record at that point.

POLLACK: He wasn't advised until after —

JUSTICE: Three days later.

JUSTICE: But why wasn't something said then?

POLLACK: Well, I think — I think things were said at that point, he didn't move for a mistrial. He didn't move to exclude the evidence, but of course, I think the trial record will show —

JUSTICE: But why wouldn't he then just have said okay give me a continuance so then we see what happens two weeks later and at that point when it's gonna come in, say now I have to have a mistrial because then the court can decide that question of mistrial early on before Esposito has been there and has been cross examined so that before any of the things are revealed, really.

POLLACK: Hindsight is certainly — 20/20 hindsight is certainly wonderful here, but he was, as Your Honor suggested in questioning Mr. Kelly, in the heat of doing this, he had prepared for three years, he had gone over all the other scientific evidence —

JUSTICE: Do you concede that the government acted in good faith —

POLLACK: They did not. I concede they certainly were not in bad faith. They did not hide this intentionally. But I do suggest, Your Honor,

that had they examined that car on the four or five separate occasions pretrial and never looked for the bullet before, immediately before trial.

JUSTICE: If the issue were one of incompetence it would be a very different question.

POLLACK: When does gross negligence, certainly in a new trial in another context, in a new trial context, gross negligence sometimes rises to the level of bad faith. It certainly does in the (? cases) situation, it certainly does in a (? cases) situation. We don't say that they intentionally did this, but as Your Honor suggested, perhaps gross negligence is involved here and they should be held to a different standard.

JUSTICE: How did the defendant, this defendant, account for the casing?

POLLACK: I'm going to answer Your Honor's question. I think you will find in the summations of counsel that the argument was, if you recall that the first shot Esposito — in the house, Esposito testified, was at close range from behind and I think, Your Honor, in reading the record you will find that defense argued that it fell out of the deceased clothing when he was put in the back seat. And, in fact, the shell casing was found in the back seat, near the passenger seat, near the deceased. Whatever that final comment with respect to the so-called corroboration with confession described by Mr. Kelly that Mr. Massaro made to another was not at all

a confession. What he said was, and this is through another informant, DeArco (phonetic), excuse my language, I'm quoting from the record, "This rat bastard gave me up and then got some evidence, but I got no problems." Hardly a confession, that —

JUSTICE: Counselor, would you characterize the evidence of guilt overwhelming in this case?

POLLACK: Not on this key count.

JUSTICE: No. Take that count out for a moment. Was the balance of this trial overwhelmingly —

POLLACK: Not if one rejects the testimony of Esposito. And it's interesting, Judge, that when the jury was deliberating each time they asked for Esposito — each time they looked at Esposito's testimony they asked for corroborating testimony. Never once did they consider Esposito's testimony alone. So on some counts I would say that the proof here was strong —

JUSTICE: Overwhelming. Overwhelming.

POLLACK: On other counts it was far from overwhelming. For example, on the Tiffany they failed to prove the ****** That's what we ******

AFFIDAVIT OF ROBERT J. KOPEC

I, Robert Kopec, being first duly sworn and cautioned according to law, do hereby state the following under oath, TO WIT:

1. I am a Forensic Scientist in private practice in Winter Park, Florida. I have over 25 years experience in Forensic Science and involvement with many thousands of criminal and civil cases. My practice consists of collecting, evaluating, analyzing, and consulting in the areas of criminalistics, serology, and trace evidence, including microscopic and instrumental analysis, crime scene evaluation, fingerprints, inspection and sampling of evidence, and crime scene reconstruction.

2. I am a partner in Morris-Kopec Forensics, Inc., 7523 Aloma Avenue, Suite 207, Winter Park, Florida 32792. Morris-Kopec Forensics, Inc. is a private laboratory providing laboratory and consulting services to attorneys, industrial corporations, and governmental agencies.

3. I have been qualified to give expert testimony in federal, state, and military courts in virtually every state in the United States and have testified internationally. The Affiant has been employed as a Forensic Scientist-Investigator by numerous governmental agencies including the Bureau of Alcohol, Tobacco, and Firearms, Florida Department of Law Enforcement Crime Laboratory, Oregon State Police Crime Laboratory, Metropolitan Police Department-Washington, DC, and The Seminole County, FL. Sheriffs Department. Affiant is a member in good standing of the American Academy of Forensic Sciences (Fellow), International Association for Identification, American College of Forensic Examiners, Association of Official Analytical Chemists, and the International Association of Bloodstain Pattern Analysts. The Affiant has been educated at the State University of New York- College at Fredonia, SUNY-

College of Agriculture and Technology at Farmingdale, George Washington University, The FBI Scientific Training Division at Quantico, VA, and numerous other institutions in the United States.

4. I have extensive experience in analyzing and evaluating forensic evidence, including hair, blood, firearms, and other types of evidence in criminal cases. I also have extensive training and experience in the evaluation, collection, and preservation of forensic evidence, and in crime scene reconstruction. I have responded to many hundreds of major crime scenes and have been responsible for the collection, preservation, documentation, and laboratory analysis of physical evidence. I have been qualified as a testifying expert in cases involving this type of evidence and have consulted on and assisted attorneys and governmental agencies with the preparation of many cases involving this type of evidence and, in criminal cases, I have testified at the request of both the prosecution and the defense. I have been involved in, or assisted with, numerous capital cases. As a result of my testimony in criminal and civil cases, I am familiar with the evidentiary limitations on expert testimony, standards controlling the proper introduction of scientific evidence, and the degree and extent to which scientific testimony is generally subjected to adversarial scrutiny in the courtroom. See attached curriculum vitae.

5. The affiant has instructed judges, attorneys, police officers, and forensic scientists in the areas of forensic science, criminalistics, evidence and crime scene procedures at numerous colleges and other institutions throughout the United States.

6. The affiant has reviewed numerous police reports, laboratory reports, autopsy reports, statements, photographs, diagrams, and transcripts of trial testimony in the case of the United States v. Joseph Massaro, S1 92 Cr. 529 (MGC).

7. Based upon extensive training and experience involving firearms related crimes and the resulting crime scenes and evidence, in addition to a review of the documentation in the above-cited case, the affiant offers the following discussion and opinions in support of his conclusion that it is unlikely that the shooting that resulted in the death of Mr. Fiorito occurred in the vehicle, and that the physical evidence is inconsistent with the scenario given in the testimony of Mr. Esposito. In essence, Mr. Esposito states that while he was driving a Chevrolet Monte Carlo, Mr. Massaro, who was sitting in the front passenger seat of the vehicle, turned around and discharged a handgun, striking the head of Mr. Fiorito, who was lying in the back seat and floor area.

8. Mr. Esposito states in his testimony, that he and Mr. Massaro attempted to carry the body of Mr. Fiorito up the basement stairs, and that the body kept slipping from his grip because of the large quantity of blood. Mr. Esposito then states that Mr. Massaro threw the body over his shoulder and carried Mr. Fiorito up the stairs. Mr. Esposito repeatedly states that the hands and clothing both himself and Mr. Massaro were heavily bloodstained with Mr. Fiorito's blood. During the crime scene processing of the vehicle by Detectives Ahem and Green, no blood was observed on the front seats or front seat area where Mr. Esposito tested that he and Mr. Massaro were seated in their bloody clothes. No blood was recovered from the doors that they opened, no blood was recovered from the steering wheel or other vehicular controls, and no blood was recovered the interior door handles. It is illogical and unbelievable that two people who are alleged to have blood saturated clothes and hands can put a body in the back seat of a vehicle, get into the vehicle, sit in the front seats, and drive for a period of time, and then exit the vehicle without transferring traces of blood to the vehicle. Clearly the absence of transferred blood in the front seat area of this vehicle is inconsistent with the testimony of Mr. Esposito.

9. Mr. Esposito states that both he and Mr. Massaro were inside the Monte Carlo for an extended period of time after depositing the body of Mr. Fiorito inside. Even though the interior and exterior of this vehicle was processed for the presence of latent fingerprints by Crime Scene Unit Detectives Ahem and Green. Mr. Massaro's fingerprints were not found in or on this vehicle. Even though latent finger or palm prints are not always left at the scene, it would be expected that sticky bloodstained hands would leave latent prints. The absence of bloody latent prints or at least bloody smudges on the passenger side of the vehicle is not consistent with Mr. Esposito's testimony that Mr. Massaro was present in the vehicle with bloody clothing and hands.

10. It is a well documented fact that when a high speed projectile, such as a bullet, enters and subsequently exits the skull, numerous body tissues, such as blood, brain, hair, bone fragments, and scalp tissue are propelled away from the body in the direction of bullet travel. These materials, generally called "high-velocity spatter", or in a general sense "spatter", subsequently land on nearby objects. Occasionally, these same types of tissues, can be ejected out of the entrance wound in the direction of the origin of the bullet. This type of spatter is called "backspatter". It should be noted that these types of phenomena are not to be considered rare, as the scientific literature and the affiant's personal experience, agree that its occurrence is extremely common. Doctor Jacqueline Lee, of the New York City Medical Examiners Office, also testified in this case, that skin, hair, and skull fragments would be projected from the exit wound, which measured one-half inch by five-eights inch (1/2" x 5/8").

During any crime scene investigation, the observation and analysis of these types of spatter can be extremely valuable in reconstructing the events that took place. They can assist in establishing the presence and position of the victim and the assailant at the suspected crime scene. Likewise the

absence of these types of spatter should cause suspicion that the gunshot that caused the victims injury did not occur where the victim was found.

In the instant case, the decedent, Mr. Fiorito, was found in the back seat area of a Chevrolet Monte Carlo with two gunshot wounds to his head. The first occurring of these wounds, as determined by Dr. Lee, entered the left side of Mr. Fiorito's head, passed through his brain, and was retained inside the cranial cavity. The second occurring wound also entered the left side of Mr. Fiorito's head, traveled through his brain, and exited the right side of the skull. An examination of the autopsy photograph of this exit wound appears to reveal missing fragments of tissue from Mr. Fiorito's scalp and hair. Under these conditions skull fragments, blood, scalp tissue, hair, and perhaps brain tissue would be ejected from this exit wound, and perhaps also from the entrance wound, and land at the scene of the shooting. In this case, Detectives Ahern and Green of the NYPD Crime Scene Unit conducted an investigation of the interior of this vehicle. Detective Ahern's trial testimony reflects that he did not observe any spatter, hair, bone fragments, or other types of tissue in the vehicle with the exception of pooled blood on the floor. The vehicle was also searched numerous times by Detective Carbone, and perhaps others, none of which report observing any spatter within the vehicle. This is certainly not the anticipated, logical, or believable result, if the victim, Mr. Fiorito, was shot in the head with a .380 autoloading pistol with jacketed hollow-point ammunition which exited his skull within the vehicle. The absence of high-velocity spatter is inconsistent with Mr. Esposito's testimony that the victim was shot within this vehicle.

11. In this case, Mr. Esposito alleges that the Monte Carlo is the scene of the shooting. This vehicle was searched by Detectives Ahern, Green, and Carbone on numerous

occasions. During his cross examination, Detective Carbone, states that during one of his searches, he pulled up the carpeting approximately three-quarters of the way toward the drivers front seat. It should be considered highly significant that none of these searches revealed the presence of the bullet and bullethole in the carpeting, until they were observed years later by an untrained civilian, Mr. O'Neill. This failure to locate the bullet and bullethole during the numerous searches by trained professional police officers and trained crime scene investigators leads the affiant to regard with serious suspicion the provenance and location of this bullet in the years intervening between the shooting and the discovery of the bullet.

12. An examination of the documents concerning the condition of the two projectiles, that are alleged to have caused the two wounds to Mr. Fiorito, also leads the affiant to a conclusion of serious suspicion in regards to the provenance of the recovered second projectile. The first wound to Mr. Fiorito's head was caused by a projectile that entered the left side of his head, traveled through the brain, and was recovered within the cranial cavity at autopsy as copper jacket fragments and lead core fragments. This projectile appears to be a copper jacketed hollow point bullet similar to the second projectile, and was completely fragmented after passing through one side of the victims' skull. The second wound to Mr. Fiorito's was caused by a projectile that entered the left side of his head, traveled through the brain, and exited through the right side of the victim's skull and scalp. This projectile is then alleged to have passed though the carpeting and insulation of the vehicle, and stopping adjacent to the metal floor of the vehicle. Mr. O'Neill testified that he did not observe a dent or other deformation of the metal or paint as would have been expected. This projectile, when recovered, was found to be only a moderately deformed condition. This bullet, which can be described as a copper jacketed hollow point bullet,

would have been expected to be found in an extremely deformed condition, particularly after passing though both sides of the victim's skull, his brain, and striking the carpeted metal floor of the vehicle. The condition of this projectile, when found, is inconsistent with the wounds and certainly causes the affiant to view the involvement of this particular projectile with great suspicion.

13. The presence or absence of dead maggots under the carpeting of the vehicle, years after the incident, have no bearing or probative value in this case and add nothing to the reconstruction. Flies, and other types of insects, will commonly lay eggs in a food source for their larvae, long after the deposition of the blood, body fluid, or other food source. The only nexus that can be drawn between the presence of the maggots and the victim is the presence of the victims blood on the floor of the vehicle. No conclusion can be reached as to when the eggs were laid. It should be noted that this incident occurred during the winter when flies are not expected to be active in the outdoors in New York.

14. Mr. Esposito states that while he was driving the vehicle, Mr. Massaro turned around, while seated in the front passenger seat, and shot the Mr. Fiorito in the head. This refers to the second shot which is alleged to have passed from left to right and in an upwards direction through Mr. Fiorito's head, exited, and passed through the carpeting before coming to rest on the left (drivers) side of the center hump. When considering the total position of Mr. Fiorito's body with his feet on the floor and midsection on the seat, the affiant is of the opinion that is highly unlikely that a right-handed person can twist around in the passenger front seat, and shoot someone through the head, with the bullet striking the left side of the center hump. Quite simply, the left side of the hump is the opposite or protected side away from the shooter.

15. The position of the victim's body at the time of the shooting is of critical importance in this case. Mr. Esposito alleges that Mr. Fiorito's body was placed in the rear seat area of the Monte Carlo with his feet on the floor behind the front passenger seat, his midsection of the seat, and the head on the drivers side of the rear seat/floor area. Mr. Esposito further states that before finally leaving the vehicle, he reached through the driver- side door and that he moved the victim's body to a sleeping position with limited success. A review of the photographs reveals information that may shed light on the victim's position at the time of the bloodshed. In the photographs taken by Detective Green at the scene, the face and upper torso of Mr. Fiorito are clearly shown. One feature of great importance is that the left side of the victim's face and the left side of the victim's clothing are heavily covered with blood, while the right side of the victim's face is relatively clean except for a few rivulets of blood. It is this affiant's expert opinion that this clearly illustrates that the left side of Mr. Fiorito's head was down at the time of bloodshed and was most probably in close contact with a surface, which was most probably the driver side rear floor where pooled blood was also observed. The great significance of this observation, is that if the left side of the victim's head and face were down, probably against the floor, it would have been virtually impossible for a bullet to have entered the left side of the head and exited on the right side, as the left side of the head would have been clearly protected from gunshot entry by its position. The location of the "bullethole" on the left side of the center hump is inconsistent with Mr. Esposito's version of the shooting.

16. It is the expert opinion and conclusion of the affiant, that it is highly unlikely that the projectile recovered from the automobile is, in truth, connected with the shooting of Mr. Fiorito. A more detailed evaluation of documents, photographs, notes, and reexamination of some of the items of physical evidence, not available to the affiant at this time,

will undoubtedly lead to additional information which can assist the affiant and the court in resolving these issues. An examination and evaluation of the documents already reviewed, clearly indicates to the affiant that "something does not fit". The testimony given by Mr. Esposito that Mr. Massaro turned around and shot Mr. Fiorito within the vehicle "does not fit" the physical evidence; and that some of the physical evidence, the second projectile in particular, "does not fit" in the version of the shooting given by Mr. Esposito. It also appears to the affiant that assumptions were made regarding the physical evidence that may be scientifically insupportable.

17. In summary, It is the expert opinion and conclusion of the affiant, that the testimony of Mr. Esposito regarding the shooting of Mr. Fiorito, is not consistent with the physical evidence in this case.

Submitted under oath by:

/s/ Robert J. Kopec
Robert J. Kopec, Forensic Scientist

JEAN H COLLINS
My Commission CC306596
Expires Aug. 30, 1997
Bonded by HAI
800-422-1555

NOTARY PUBLIC
[SEAL]
STATE OF FLORIDA

Sworn and subscribed to me
on this 21st day of March, 1997
Affiant is personally known to me

/s/ Jean H. Collins

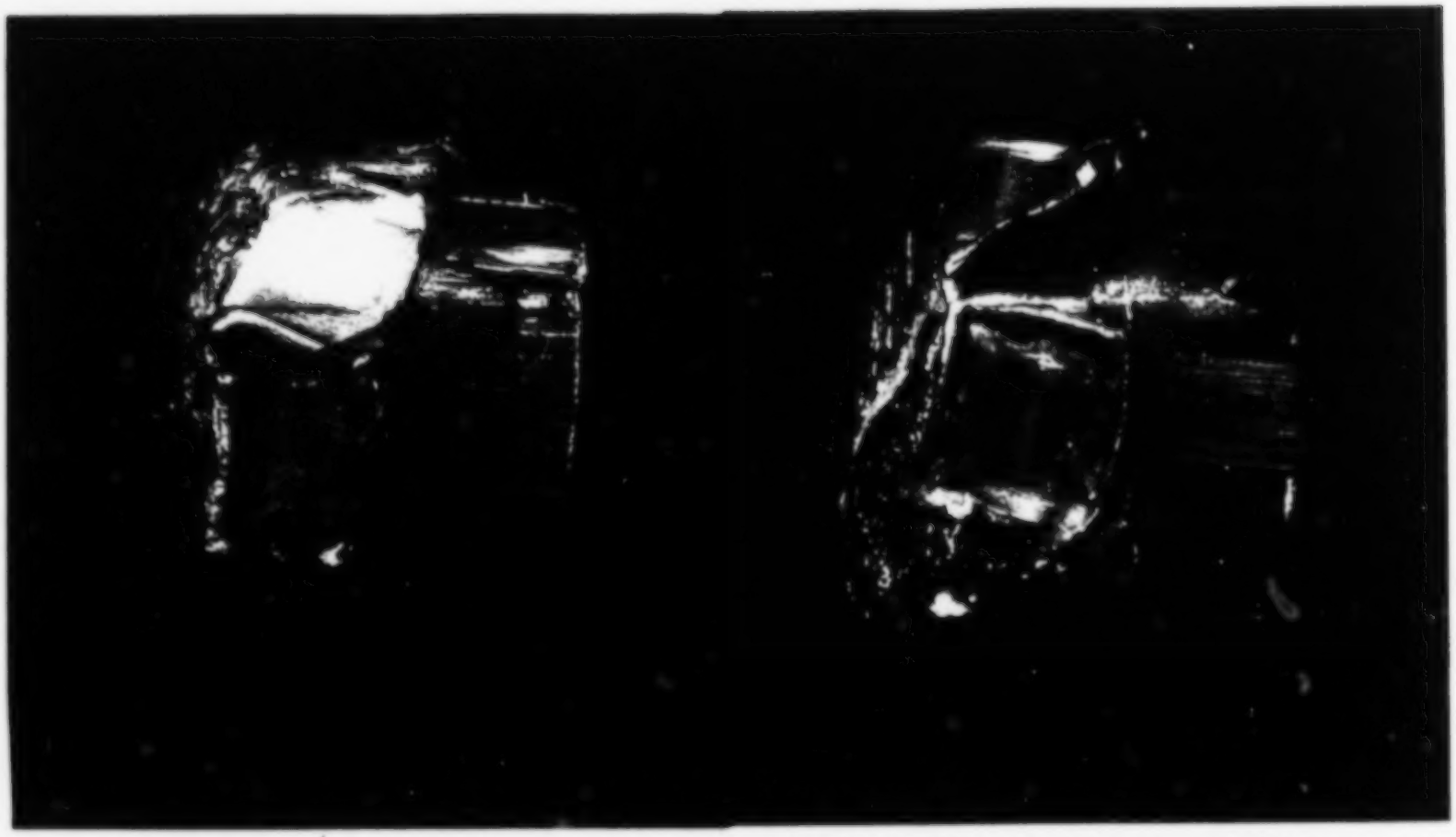
Jean H. Collins
Notary Public
7523 Aloma Ave., Ste. 106
Winter Park, FL 32792

High speed photograph showing spatter effect of projectile passing left to right through simulated skull. Note projected forward spatter to right of target and projected backspatter to left of target.

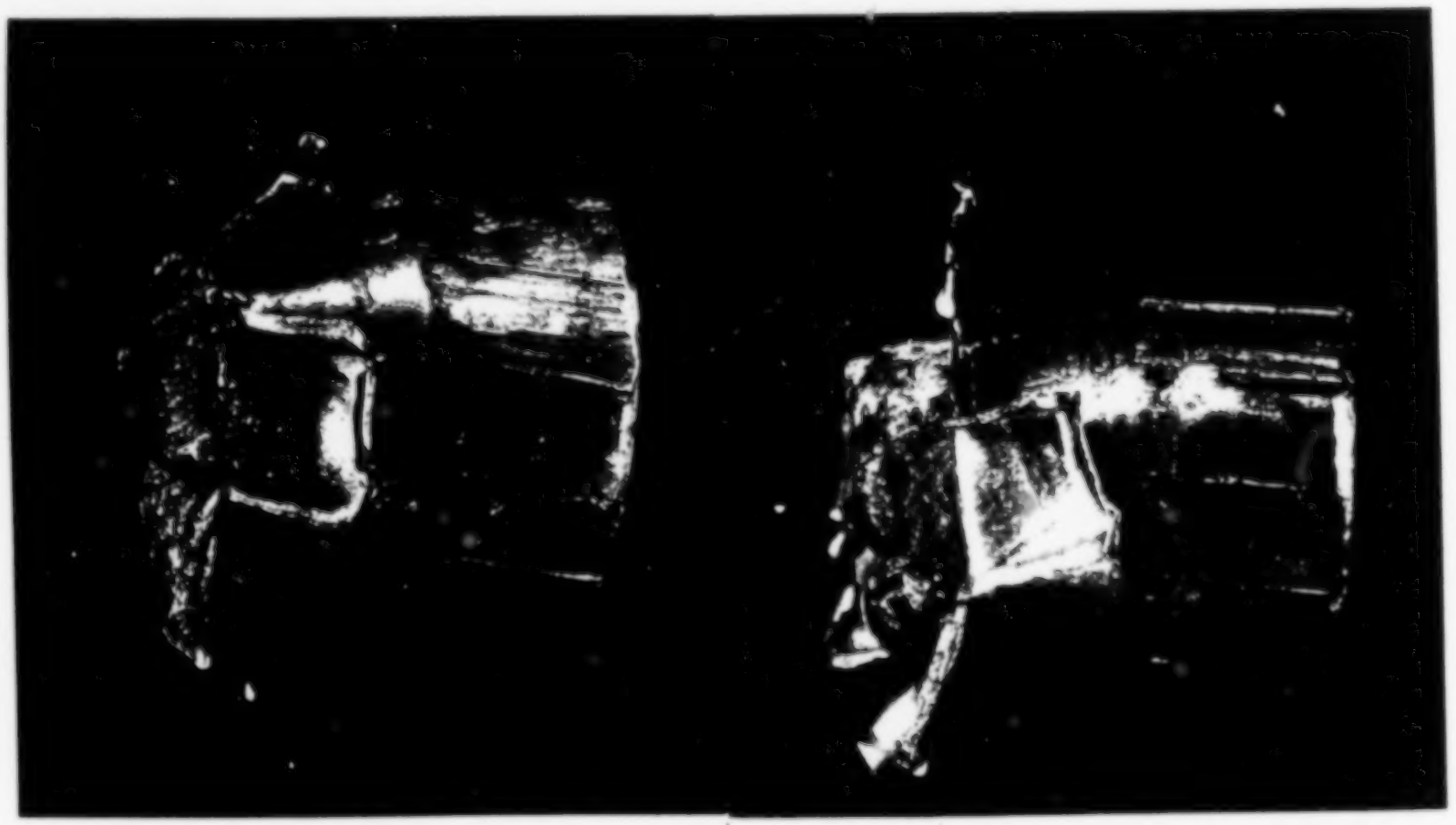
Backspatter and forward spatter patterns produced when blood droplets struck nearby surface as projectile passed through simulated skull in above photograph. Note the large number of blood droplets striking this surface in distinct zones.

Photograph of the projectile recovered by Mr. O'Neill from the Monte Carlo.
Note the degree of deformation and compare to the projectile fragments recovered from the cranial cavity of Mr. Fiorito in the photographs below.

Photographs of the deformed bullet jacket and lead-core fragments
recovered from the cranial cavity of Mr. Fiorito at autopsy.



.380 Auto caliber projectiles from cranial cavity of pig. Note that these projectiles passed through one side of the pig skull and did not exit. Note the degree of deformation in these projectiles. The hollow-point section is completely deformed and fragmented and the copper-jacket is expanded and partially fragmented.



.380 Auto caliber projectiles recovered after striking and passing through simulated fluid-filled tissue,, such as a brain. Note that the hollow-point section and copper-jacket of these projectiles are deformed and partially fragmented.

ROBERT J. KOPEC

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CURRICULUM VITAE

1989–Present	Morris-Kopec Forensics Incorporated, Winter Park, Florida Independent Forensic Consultant
1978–1989	Kopec Forensics Incorporated, Longwood, Florida Independent Forensic Consultant
1980–1989	Seminole County Sheriff's Department, Sanford, Florida Forensic Scientist – Crime Scene Investigator
1978–1980	Florida Department of Law Enforcement Sanford Regional Crime Laboratory, Sanford, Florida Crime Laboratory Analyst Supervisor
1978–1978	Oregon State Police Crime Laboratory, Portland, Oregon Senior Criminalist
1976-1978	Bureau of Alcohol, Tobacco, and Firearms Headquarters Forensic Laboratory, Washington, D.C. Forensic Scientist
1970-1976	Metropolitan Police Department, Washington, D.C. Forensic Scientist – Identification Technician

OTHER EXPERIENCE

Seminole Community College, Adjunct Faculty Instructor
Criminalistics, Forensic Science, Crime Scene Photography, Crime Scene Investigation

Lehigh Valley Community College, Schnecksville, PA
Adjunct Faculty Instructor: Criminalistics, Major Crime Investigation

Florida Department of Law Enforcement, Sanford Regional Crime Laboratory
Assessment and Training Supervisor for Analysts

Bureau of Alcohol, Tobacco, and Firearms,
Headquarters Forensic Laboratory,
Practium supervisor for graduate students from George Washington University, and Northeastern University

ASSOCIATIONS

American Academy of Forensic Sciences (Fellow)
American Board of Forensic Examiners
International Association for Identification
Association of Official Analytical Chemists
International Association of Bloodstain Pattern Analysts

EDUCATION

BS Degree: Earth Science (1969)
State University of New York – College at Fredonia,
Fredonia, New York

Forensic Serology
George Washington University, Washington, DC

Mechanical Technology and Drafting
State University of New York- College of Agriculture and Technology
Farmingdale, New York

FBI Scientific Training Division, Quantico, VA

American Institute of Applied Sciences, Youngsville, NC

Drug Enforcement Administration, Washington, DC

McCrone Research Institute, Chicago, IL

EMV Associates, Rockville, MD

North Carolina State University,

Seminole Community College, Sanford, FL

Valencia Community College, Orlando, FL

Lehigh Valley Community College, Schnecksville, PA

COURT TESTIMONY

Qualified to give expert testimony approximately 1500 times in Federal, State, and military Courts in virtually every state in the United States

SPECIALIZED TRAINING COURSES

FBI Scientific Training Division
Survey of Glass Examinations
Forensic Microscopy of Hair
Forensic Microscopy of Fibers
Fingerprint Classification

George Washington University
Forensic Serology

North Carolina State University
Wood Technology

Drug Enforcement Administration (BNDD)
Drug Identification

Florida Department of Law Enforcement
Forensic Paint and Instrumental Analysis
Supervisory Techniques
Uniform Offense and Arrest Report

American Institute of Applied Science
- Fingerprint Identification
- Firearms Identification
- Criminal Investigation

Metropolitan Police Dept. Washington, DC
- Crime Scene Search School
- Crime Scene Photography
- Advanced Forensic Photography
- Police Training Academy

Valencia Community College
- Arson Detection and Investigation
- Identification of Human Remains
- Blood Stain Pattern Analysis
- Detection of Blood in the Field and Laboratory
- Ochterlony Analysis

Seminole Community College
- Investigation of Crimes Against Persons
- Police Photography
- Crime Scene Investigation
- Crime Scene Photography
- Constitutional Law
- Instructor Techniques
- Effective Presentation Skills

McCrone Research Institute
- Forensic Polarized Light Microscopy
- Advanced Optical and Electron Microscopy

EMV Associates
- Scanning Electron Microscopy
- Energy Dispersive X-Ray Analysis

National Bureau of Standards – Nuclear Reactor Safety and Procedures

SCIENTIFIC PUBLICATIONS

"The Identification of .22 caliber Rimfire Ammunition Suitable for Gunshot Residue Determinations", Identification News, 29(9):10-13 (1976)

"A Low Cost Improvised Gunshot Residue Collection Kit," Identification News, 27(6):6-7 (1977)

"Systematic Approach to the Detection of Explosives Residues: Part 5 — Black Powders," Journal of the Association of Official Analytical Chemists, 60(6):1331-1340 (1977)

"Forensic Applications of Sapphire-Cell Spectroscopy: Companion to the Diamond-Cell in the Investigation of Explosive and Blasting Cap Legwire Identification," Journal of Forensic Sciences, 23(1):57-65 (1978)

"Gunshot Residues from Black Powder Percussion Weapons," Identification News, 28(2):3 1978

"The Analysis of Synthetic Fibers by Diamond and Sapphire-Cell Infrared Spectrometry," Journal of the Association of Official Analytical Chemists, 61(3):526-532 (1978)

"The Application of Prefiltration to the Analysis of Acid-Degraded Gunshot Residue Swabs," Journal of Forensic Sciences, 24(1):92-95 (1979)

"Diamond and Sapphire Cell Infrared Spectrometry: A Powerful New Tool in the Forensic Laboratory," Journal of Police Science and Administration, 7(4):426-438 1979

"The Evidentiary Value of Paint Chips", Journal of Forensic Sciences, 24(1):40-147 (1979)

"An Inexpensive Marijuana Grinder," Florida Division — International Association for Identification Journal, 11(1):1-4 1979

"Comparative Analysis of Trash Bags — A Case History," Journal of the Association of Firearms and Toolmark Examiners, 12(1):23-26 1980

"The Evidentiary Value of Automobile Paint, Part 2: Frequency of Occurrence of Topcoat Colors," Journal of Forensic Sciences, 26(1):64-74 1981

"Ephedroxane: A New Drug of Abuse," Microgram, 25(3):49-56 1992

"Blood and Breath Alcohol: Theory and Practice," 1993

"Intoxilyzer 5000 and the Air Blank Zero, Part 1: Purging the Sample Chamber," DWI Journal: Law & Science, 11(12): 5-10 1996

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FORMER U.S. SECRET SERVICE AGENT

3/18/97

AFFIDAVIT

My name is Rene J. Trasorras; I am a former Special Agent with the United States Secret Service. I am the owner and chief investigator of R.J. Trasorras Investigations and have operated this agency since 1993. As a former government agent I was trained at the Federal law-enforcement Training Center in Glynco, Georgia, where I successfully graduated with the certification of Criminal Investigator. I received further specialized training in Washington D C, at the U.S. Secret Service Special Agent Training center where upon successful completion each agent is given top secret clearance. During both training schools I received extensive training in criminal investigations and the use of firearms. During my tenure in the Secret Service I was assigned to the Miami Field office and I was assigned to the counterfeit squad where I operated as a major case agent in the Southern District of Florida. During this period I was the case agent on what resulted in the largest single seizure in the history of the Secret Service. That case lead to the arrest of 10 individuals, two of which were categorized by Interpol as terrorists and wanted by the Israeli Mossad. I was assigned to various protective assignments including that of the President and Vice president of the United States; the Pope; and various visiting dignitaries and was involved in countless criminal investigations

Based on my training and experience as an investigator, and based on my review of the "facts" of this case it is my

opinion that the shooting could not have happened as described by the government witness.

Explanation;

Discovery of the bullet:

Once impounded, the subject vehicle should have been thoroughly searched for the projectile. This search should have included the removal of the seats, carpeting, the internal door covers, and headliners. Anything short of this type of search should be viewed as malfeasance. There is no question in my mind that a crime scene search conducted by the NY PD or the FBI would have recovered a bullet had one been in the vehicle. Once the vehicle is released, and the chain of custody is broken, anything found from that point forward is suspect. The chain of custody preserves the evidence, should any exist, in the area or object being searched. Any evidence found after the chain of custody is broken should not be introduced as the possibility of tampering now exists. The validity of this type of evidence should be viewed as tainted and not considered when passing judgement on another when such serious consequences are involved.

Shooting;

A shooting resulting in a through and through head shot would have to result in some form of splatter onto the surface closest to the exit wound. This splatter could consist of blood, hair or skin, skull or brain matter. For there to be a story as the one presented by the government witness one must expect to find some form of this human matter regardless of the amount. Additionally, the governments charting of the trajectory of the bullet that was recovered some 3 years after the initial crime scene search as related by the government witness further dilute the story.

Based on the review of these facts, my training as a criminal investigator and my experience in these types of

cases it is my opinion that the shooting as related by the government witness could not have happened as described, AND Patrick Esposito's testimony must be viewed as perjured.

Rene J. Trasorras

THE ABOVE STATEMENTS ARE TRUTHFUL AND MADE TO THE BEST OF MY KNOWLEDGE.

AFFIANT SIGNATURE /s/ DATE 3-18-97

NOTARY:

GRETCHEN L. SELLERS
/s/ Gretchen L. Sellers
MY COMMISSION CO 377106
EXPIRES JUNE 7, 1998
NOTARY PUBLIC
[SEAL]
STATE OF FLORIDA
[illegible] Notary Public Underwriters

PERSONALLY KNOWN/PRODUCED ID

[illegible] 2/7/97
[illegible] 2/7/**[illegible]**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH MASSARO, Defendant.	)	CASE NO. 92 CR 529 MIRIAM GOLDMAN CEDARBAUM, JUDGE

AFFIDAVIT OF CHARLES V. MORTON

Charles V. Morton, being first duly sworn, and upon his oath, does attest to the following:

1. I am the director of the Forensic Science Division of Forensic Analytical Specialties, Inc., Hayward, CA 94545. I received my Master of Criminology degree in Criminalistics from the University of California, Berkeley in 1971.

2. I am a member of the California Association of Criminalistics, International Wound Ballistics Association, American Academy of Forensic Sciences, and California Association of Crime Laboratory Directors.

3. I was retained by Joseph Massaro to review, examine and test the evidence introduced at his trial in *United States v. Joseph Massaro*, U.S. District Court No. 92CR529 (S.D.N.Y), and specifically that evidence related to the murder of Joseph Fiorito, for the purpose of confirming the existence of material evidence not previously discovered which supports Mr. Massaro's contention that the murder

of Mr. Fiorito did not occur as described at his trial by Patrick Esposito, and that this new evidence might alter the jury's verdict or would probably result in Mr. Massaro's acquittal upon retrial.

4. On October 23 and 24, 1996, I viewed and photographed a number of items of evidence maintained in the custody and possession of the United States Attorney's office in New York City. My access to these exhibits was regulated and restricted by assistant U.S. Attorney David Kelly, and I was prohibited from copying, examining or testing the items viewed and photographed in the detail necessary to resolve questions about this evidence.

5. Based upon my preliminary review of the evidence, it is my opinion that detailed examination of certain items of evidence and photographic records is necessary in order to determine if they support or refute the version of events described by Mr. Patrick Esposito at trial. Specifically, the carpet, bullets and fragments, X-rays and photographic negatives (or images from the negatives scanned onto PhotoCD discs) would need to be examined under laboratory conditions.

It is further my opinion, based on my preliminary examination of the evidence and my review of the testimony at trial, that the government failed to adequately search for evidence and failed to conduct detailed examinations of that evidence, and that this failure prevents a critical assessment of whether or not the evidence establishes the propositions for which it was offered.

6. On October 23 and 24, 1996 I viewed and photographed the following items of evidence maintained in the custody and possession of U.S. Attorneys in New York City:

Item 1: White. "Reebok" brand athletic shoes.

Item 2: "Chess King" labeled jacket.

Item 3: Government Exhibit 93: Black shoulder holster.

Item 4: Government Exhibit 93B: Small black leather holster.

Item 5: Government Exhibit 107: "SC380 Auto" pulled bullet cartridge case and powder.

Item 6: Government Exhibit 107A: Fired bullet Item 1, pt. 380 copper jacketed hollow point.

Item 7: Government Exhibit 23: "FC380 Auto" head-stamped extended cartridge case.

Item 8: Government Exhibit 23A: Copper jacket and lead fragments from body of Joseph Fiorito (Q90-5715).

Item 9: Government Exhibit 26A: Photograph of two entry wounds.

Item 10: Government Exhibit 26B: Photograph of exit wound (#2).

Item 11: Government Exhibits 26H & I: X-ray of head wounds and the bullet fragments.

Item 12: Government Exhibit 108: Video tape: "Sgt. Carbone 9/6/93 round found in auto Fiorito homicide."

In addition to the above items, a large quantity of documents, photographs, videotapes and audiotapes, all Government exhibits, were provided but not examined in detail.

7. Prior to my review and cursory examination of these items of evidence, and in preparation for my review, I reviewed transcripts of the testimony of the following individuals who testified in Mr. Massaro's trial: Ahern, Sgro, Carbone, Kolano, Signorelli, Lee, O'Neill, and Esposito.

8. Also prior to my review of the exhibits, I reviewed the following documents:

A. (6pp):

1. Crime Scene Unit Report (90/2657B; 3/1/91/ 13670: 3/1/91 responded to scene 40 Butterfly Drive; informed V. murdered at this location & driven to 109 Pct. by auto, by perps. 23 photographs listed. (Dets. Carbone/Atkinson).

2. Crime scene unit supp. rpt.: Fingerprints: no readable f.p.s found after processing; Serology: Blood samples collected; Trace evidence: Cig. filter torn from cig. and cig. butt collected; (Dets. Signorelli/Atkinson);

3. Copy of previous page;

4. Crime Scene Unit Diagram of basement room and stairway w/location of collected evid.

5. Crime Scene Unit diagram of 1st floor & collected evidence;

6. Crime Scene Unit diagram of 2nd floor & collected evidence.

B. (5pp):

Same as A.1, 2, 4, 5 & 6.

C. (1p.) Crime Scene Unit form Report (90/2657B, 13670) Dated 9/21/90:

Body diagram form: "x---BW" above left ear. No other entries on diagrams. (same as D2 below)

D. (6pp):

1. Relatively illegible form: Joseph Fiorito illegible entries and list of photographs (Chev. auto) Same as W (original copy)

2. (copy of diagram C above)

3. Diagram: Utopia Pky/65 Ave.; Dec. Auto.

4. Hand written notes of "photos": auto, decedent rear seat etc.; 380 Auto FC B/C B/P Disch. shells G-1, recvd rear passenger side floor, Given to P.O. Digennaro #30163 107 Pet.; Veh. 1958 Chevr 9LL-422 NY 2 Dr. yellow, . . . Dec. Joseph Fiorito.

5. (copy of diagram C above)

6. CSU form 63 AV & Utopia PKW Dec. Gunshot v. @ scene. 12 photos.

E. (4pp):

1. Exam. form: exam Buick Auto lic. 4US-842 Owner Patti Esposito; 9/28/90 0825-1730 Hrs. Recovered knife; took 15 photos; precessed for f.p.s (L-1 to L-5 pos. results); Omni light used inside car with neg. results. (Dets. Luciano/Rinaldi)

2. form: request to process perps. (Patti Esposito) auto.

3. Handwritten note: Perp. Esposito. Patrick 1982 Buick (Note a portion of the upper part of the document appears to have been covered with the handwritten note. The word past is above this note.)

4. Handwritten notes "Photos": "pass. side headlight (sic) tested for blood Neg. Results, photo list, collected knife etc." (info on E.1. above).

F. (17pp):

1. "Autopsy Notes" (handwritten) Joseph Fiorito M.E. #Q90-5715: 30 yrs, 69", 177; tattoos: 2 GSW's left side of head no powder or (smoke?), Abrasion (??) of nose. [Can't read most of notes under injuries or gross diagnosis].

2. Diagram with notations;

3. 3 page typed Autopsy Report Case Q90-5715 Joseph Fiorito (21 Dec 90): clothing and shoes noted; rigor

present; purple, anterior and fixed; predom. over lower extremities;

Entrance GSW to head: left parietal≈2.5"; TOH: 5" Left of Ant. ML., 1/8th inch round hole. 1/16th inch rim of abrasion, no powder or soot deposition, from cutaneous wound through skull (1/4" inwardly beveled defect . . . terminates in occipital fossa where deformed fragments of jacket and large cal. bullet are recovered. TRAJECTORY: L→R, [unknown symbol], backward, inj. skull & brain, minimal subdural hemorrhage.

Entrance GSW of Left Temple: ≈5" [unknown symbol] TOH and 6" to left of ant. ML. 3/8th inch rounded defect, with 1/16th" rim of abras.. No powder or soot. Proceeds through middle cerebral fossa grazing horizontal portion of temporal bone, inf. aspect of temporal lobes, terminates right parietal-occipital area ≈4" [unknown symbol] TOH & 7" to right of ant. ML through a 1/2" X 5/8" split exit. TRAJECTORY: L→R, sl backward. No projectile found. Over bridge of nose: 1/2" irreg. purple abrasion, over crease of neck are purple areas of discoloration consistent with post-mortem denudation and pressure point.

4. (1p) C.M.E. Lab. Report Q90-5715 (10/31/90): no blood on knife (Item 1) from Defendant's car (analyst Tracey Fraser);

5. Office of C.M.E. City of NY Q90-5715 Police Ident. of Body form: Fiorito, Joseph: D.O.A. in Auto; Body head down behind driver's seat in rear, legs up on rear seat - homicide. (Officer DiGennaro);

6. (1p) (copy of F4 above);

7. (1p) C.M.E. Identification of Body Report Q90-5715 (9/21/90) (signed) by John Fiorito.

8. (1p) C.M.E. Toxicology Lab Report Q90-5715 (10/1/90): No drugs or alcohol detected. (Dir. of Lab. Marina Stajic);

9. (2pp) C.M.E. Lab. Report Q90-5715 (9/26/90): (Analyst Tracey Fraser): Blood typing results:

Blood detected on sneakers, jacket and jeans from "dumpster opposite Union Blvd. Forest Green Apt." could have come from (v) J. Fiorito (EsD, PGM & sub); no blood: underpants, sweater, socks.

10. (1p) City of NY P.D. Receipt for Autopsy *Evidence: 2pcs. of Def. lead frags.: 1 pc. def. c[illegible]*, (ident. marks "F.J", 9/26/90≈1130 hrs. from Dr. Jean to Det. Sgro, Ballistics squad).

11. (1p) Medical Certificate of Death Joseph Fiorito;

12. (1p) Certificate of Death (no name on form);

13. (2pp) C.M.E. Lab. Report Q90-5715 (10/31/90): (Analyst Tracey Fraser): Human blood detected on garage floor; basement steps, plastic bag from floor and carpet from den floor; Garage floor and basement steps blood could have come from Joseph Fiorito (EsD & PGM sub).

G. (2pp) Duplicates of F.1 and F.2 above;

H. (1p) Duplicate of F.5 above;

I. (1p) Duplicate of F.8 above;

J. (1p) Duplicate of F.7 above;

K. (1p) Duplicate of F.10 above;

L. (3pp) FBI DNA Report dated Feb. 23, 1993 (No copy of the original submission letter has been provided so the identifying numbers in the report can not be related to their sources, however, the items described appear to be those in F.9 above (Items from Dumpster opposite Union Blvd. Forest Green Apt.) and F.13 from 40 Butterfly Drive scene:

Blood which "matches" Joseph Fiorito (loci: D2S44, D17S79, D1S7, D4S139) found on following items:

Q16 (5) Cutting from inside front of jacket;
Q22 (13) Blood from garage floor;
Q23 (14) Blood from garage;
Q24 (15) Cutting from carpet;
(profile ≈ 1:150,000 blacks & caucasian; 1:40,000 Hispanic);
Q21 (12) Blood from basement steps; showed matching loci @ D 17S79 & D4S139.

No interpretable DNA for:

Q13 (2) right sneaker;
Q19 (9) right front leg of jeans;
Q20 (10) left pocket of jeans.

M. Duplicate of FBI Report L. above.

N. (3pp) Cover letter dated September 27, 1993 from U.S. Attorney regarding NYPD Ballistics Lab worksheet regarding .380 bullet and bullet fragment comparison. (Evidence will be made available to the defense.)

Ballistics worksheet:

A. .380 auto FC shell from scene 9/22/90;
B. 2 lead frags-6 & 8 gr? from dec. 9/26/90;
C. 1 piece of deformed Cu jacket 15.1gr? R? from dec. 9/26/93;
D. .380 cal. deformed Cu jktd HP bullet 89.0 (gr.?) R-6(?) 9/24/93.

**Items C & D fired from one gun 9/24/93 Rs

Xerographic **[illegible]** copy of photograph of ballistics evid.-appears to be nose of bullet: Item D, Government Exh. 107A.

O. (3pp) March 16, 1994 Letter form Mr. Batchelder to U.S. Attorney re: condition of maggots from under carpet and letter of response dated March 22, 1994:

> Maggots under carpeting in rear of Fiorito's car when they were discovered in the summer of 1993 - investigating officer indicates they were "very" dead.

P. (6pp) Handwritten notes:

> 2 pages listing photos 1-26 at 40 Butterfly Dr.
> 1 page Serology (Items A-1 through A-6) Evid. to Det. Carbone
> 3pp rough sketches rooms (basement, gr. fl. and top fl.).

Q. (5pp) Duplicates of pages A.1, A.2, A.4, A.5 & A.6.

R (4pp) Duplicates of pages D.3, D.4, D.2 & D.6.

S. (1p) Letter dated July 11, 1994 from Mr. Batchelder to Joseph Quirk:

> Submission of materials (reports, transcripts) regarding ballistic evidence to Mr. Quirk.

T. (5pp) Typewritten transcript of conversation between Bob Chuchinella (phonetic) and Robert O'Neill May 1, 1994 (not all of conversation included due to poor audio). Found bullet under rug - in back - took it out. [Behind driver's seat - between insulation and rug] Maggots were black - they had searched car previously - picked up carpet - did not find bullet at that time - I was going to cut this whole section of rug and throw it out - saw it fall out.

U. (3pp) Duplicate (legible) of pages D1, D2, D3 - diagram of streets, placement of auto at crime scene.

V. (3pp) Exact duplicate of U (except order of pages changed), i.e., Dl, D2, D3.

W. (1p) Original carbon copy, same as D1 (forensic report listing photos, fingerprints and ballistics).

X. (2pp) Duplicate of F13 (some passages underlined on this copy).

Y. (1p) Duplicate of F6.

Z. (2pp) Duplicate of F9

AA. (1p) Duplicate of F4.

BB. (2pp) Duplicate of F13.

CC. (1p) Duplicate of F11

DD. (1p) Duplicate of F12.

EE. (6pp) Duplicate of A1 thru A6.

FF. (6pp) Typewritten transcript of telephone conversation between Bob Chuchinella (phonetic) and Pugsley, 5/21/94. Lisa's car - there was a lot of blood in it - pretty bad odor, had to shampoo a couple of times @ detail shop. Stains were pretty bad in the back. It was just bad fingerprint dust all over everything, console, dashboard, armrest, white powder all over dashboard and seats. Latex gloves left in car dissolved in seats.

9. Finally, I reviewed a series of photographs as follows:

23 (8" x 10" color) Crime Scene unit labeled photographs corresponding to photographs listed in "Crime Scene Unit" Report 3/1/91 by Det. Atkinson. These show scene at 40 Butterfly Drive (see "A" above).

15 (8" x 10" color) photographs with Orange Crime Scene Unit labels marked: "Run NO 90/2657 A" - showing a two tone Buick 4 Door with license New York 4US-842 and a knife and sheath. (one of the knife photographs has a "Defendant's Exhibit A (ID)" label on it. [see E, above].

9 (8" x 10" color) photographs with Orange Crime Scene Unit labels marked "Run No 90/2657". These show a white Chevrolet 2 Door with maroon interior (2) street scenes (2), victim on concrete (1) and victim in Chevrolet behind front

seats (4). These appear to correspond to the photographs in the Forensic Report dated 9-21-90 by Dte.(*sic*) Green 3289 and Det. Ahern. This report lists 12 photographs and this group of 9 appears to correspond to photographs numbered 1,2,3,4,5,6,7,8 and 12. Photographs 9, 10 and 11 have not been received. (see W above).

2 (8" x 10" Black and White) photographs of male victim's head with apparent bullet hole in head. Based on review of the autopsy report (see F, above) one of these photographs shows the two entry wounds on the left side of the head. The other photograph shows a shaved area of the head and an apparent exit wound which appears to be over the left ear. It does not show the two apparent entry wounds on the left side of the head shown in the previous photograph. Based on the first photograph and the autopsy report it is apparent that this photograph has been reversed and actually shows the exit wound over the right ear.

10. Based on my review of evidence, exhibits and trial testimony, I have reached the following tentative conclusions:

My review of the documentation and evidence up to this point has raised serious questions about the validity of this evidence and its ability to support or refute the statements of Mr. Esposito. The initial and subsequent, presumably detailed, examinations of the vehicle by police investigators did not reveal the bullet or the hole in the carpet which was subsequently reported by Mr. O'Neill. No attempt was made to adequately document the condition of the hole in the carpet or to test it to determine if, in fact, it was a bullet hole consistent with the .380 auto cartridge case and bullet found in this case. In addition, as shown in the videotape (Exhibit 108), an apparent pen was placed through the hole potentially destroying evidence which would allow a determination to be made about the source of this hole. No. attempt was made to test blood or tissue residues on the

bullet, as shown in photographs, to determine if it was consistent with being from the victim. In sum, I am able to say that failure to find and properly analyze certain items of evidence creates a significant doubt as to the reliability of the forensic evidence belatedly produced at trial.

11. As recounted above, my inability to answer the questions raised by the initial failure to find the bullet hole in the carpet, resulted from the failure to make available the carpet from the vehicle and the requirement that evidence be examined under restricted conditions in a non-laboratory setting. I would, therefore, support the defendant's request that the court order discovery of the appropriate items of evidence and photographic negatives and require that the opportunity be made to examine this evidence in the necessary laboratory facility. This would allow me to determine if the evidence available is adequate to answer the questions raised and to answer them where possible.

Further Affiant sayeth naught.

DATED this _____ day of _____, 1997.

_____
Charles V. Morton

STATE OF CALIFORNIA)
CITY OF OAKLAND) SS:
COUNTY OF)

Subscribed and sworn to before me this _____ day of _____, 1997.

My commission expires:

_____

(Seal)

_____
NOTARY PUBLIC

JA107

[seal]

U.S. Department Justice

United States Attorney
Southern District of New York

One Saint Andrew's Plaza
New York, New York 10007

September 11, 1993

By Hand
Harry C. Batchelder, esq.
123 William Street
New York, New York 10038

Re: United States v. Joseph Massaro
S1 92 Cr. 529 (MGC)

Dear Mr. Batchelder:

Please be advised that on September 6, 1993, a bullet was recovered from under the carpet in the rear area of the white Monte Carlo in which the body of Joseph Fiorito was discovered on September 21, 1991. The bullet has been submitted to the NYPD laboratory for tests and will be available for your examination shortly. In addition a video recording, demonstrating where in the vehicle the bullet was recovered and the hole that it caused in the carpet of the car is available for your inspection in the United States Attorney's Office. We will advise you promptly if the Government intends to offer either the video or bullet in its case-in-chief.

Very truly yours,

MARY JO WHITE
United States Attorney

By: /s/ David N. Kelley
DAVID N. KELLEY
Assistant United States Attorney
Tel.: (212) 791-9273

By: /s/ Randall W. Bodner
RANDALL W. BODNER
Assistant United States Attorney
Tel.: (212) 791-9275

cc: Honorable Miriam Goldman Cedarbaum

JA110

[seal] U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 24, 1993

By Facsimile
Harry C. Batchelder, Jr., Esq.
123 William Street
New York, New York 10038

Re: United States v. Joseph Massaro
S1 92 Cr. 529 (MGC)

Dear Mr. Batchelder:

Please be advised that I was informed this mornin**[text cut off in original]** the NYPD Ballistics Laboratory has determined that the bulle**[text cut off in original]** was recovered from Fiorito's car matches the shell fragments **[text cut off in original]** from Fiorito's head, that is, the two bullets were fired fr**[text cut off in original]** same .380 caliber handgun. I will provide you with a copy **[text cut off in original]** the Laboratory worksheet when I receive it this afternoon.

Very truly yours,

MARY JO WHITE
United States Attorney

By: /s/ David N. Kelley
DAVID N. KELLEY
Assistant United States Attorney
Tel.: (212) 791-9273

cc: Honorable Miriam Goldman Cedarbaum

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Bryan Morgan, Of Counsel
Michael E. Tigar, Of Counsel
(Admitted in DC & NY,
not admitted in CO)

July 25, 1996

David Kelly, Esq.
Office of the U. S. Attorney for the Southern District
of New York
One Saint Andrews Plaza
New York, NY 10007

Re: United States v. Joseph Massaro, District Court Case # 92-CR-529, S.D.N.Y.

Dear Mr. Kelly:

I have been retained by Mr. Joseph Massaro to review the evidence and proceedings leading to his conviction in the above-captioned case, in anticipation of presenting post-appeal motions on his behalf in the District Court for the Southern District of New York. I have retained the services of a forensic expert, Mr. Charles Morton, who will require access to all of the physical evidence and exhibits and a reasonable opportunity to conduct independent analysis and testing of the evidence in this case.

It is my understanding that the physical evidence and exhibits are now in the possession of your office. I ask your assistance in making these materials available to Mr. Morton and those working with him for examination and, if required, for independent testing at your own labs or at another local facility.

Please contact me at your earliest convenience so that the necessary arrangements can be made.

Sincerely,

/s/ Michael E. Tigar
Michael E. Tigar

MET/ss

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Bryan Morgan, Of Counsel
Michael E. Tigar, Of Counsel
(Admitted in DC & NY,
not admitted in CO)

August 8, 1996

David Kelly, Esq.
Office of the U. S. Attorney for the Southern District
of New York
One Saint Andrews Plaza
New York, NY 10007

Re: **United States v. Joseph Massaro, District Court Case # 92-CR-529, S.D.N.Y.**

Dear Mr. Kelly:

As you have not responded to my letter to you dated July 25, 1996, I write again to request that you contact me promptly and confirm arrangements which will enable my forensic expert, Mr. Charles Morton, to examine and test the physical evidence and exhibits in Mr. Massaro's case.

I am sure you are aware that where post-appeal motions are concerned, time is always of the essence. Every delay in making the evidence available to my expert and those working with him impedes my efforts on behalf of my client in this case. I await your call.

Sincerely,

/s/ Michael E. Tigar
Michael E. Tigar

MET:jb

cc: Judge Miriam Goldman Cedarbaum
Joseph Massaro

HADDON, MORGAN & FOREMAN, P.C.
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Bryan Morgan, Of Counsel
Michael E. Tigar, Of Counsel
(Admitted in DC & NY,
not admitted in CO)

October 2, 1996

David Kelly, Esq.
Office of the U. S. Attorney for the Southern District
of New York
One Saint Andrews Plaza
New York, NY 10007

Re: **United States v. Joseph Massaro, District Court Case # 92-CR-529, S.D.N.Y.**

Dear Mr. Kelly:

I am writing to confirm our scheduling of the review, examination and testing of exhibits in the above-captioned case by Mr. Massaro's expert, as first requested by Mr. Massaro in a letter addressed to you on July 25.

You agreed on September 30, 1996, that the exhibits and physical evidence would be available to Mr. Massaro's expert on October 21, 1996 and throughout the week. As the expert, Charles Morton, will be traveling to New York for the express purpose of evaluating the evidence from Mr. Massaro's case, please let me know at your earliest

convenience exactly where the examination will take place so that the necessary arrangements can be made.

At present, and as Rachel Bellis told your assistant on September 30, the only portion of your closed case file that Mr. Morton requires (in addition to the evidence and exhibits themselves) are the exhibit lists compiled by the prosecution and defense and filed with the court. Should Mr. Morton advise that he needs any other materials from the file, we will inform you promptly.

Sincerely yours,

/s/ Michael E. Tigar
Michael E. Tigar

cc: Judge Miriam Goldman Cedarbaum
Joseph Massarro
Charles Morton

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH MASSARO, Defendant.	)	CASE NO. 92 CR 529 MIRIAM GOLDMAN CEDARBAUM, JUDGE

AFFIDAVIT OF ERIC KUSKE

Eric Kuske, being first duly sworn, and upon his oath, does attest to the following:

1. I am a 1996 graduate of the University of Kansas School of Law. During 1995 and 1996, I assisted professor Stephen McAllister of the University of Kansas School of Law in the investigation of post-trial and post-conviction motions for Joseph Massaro. Mr. Massaro was tried and convicted in 1993 in U.S. District Court No. 92 CR 529 (S.D.N.Y.).

2. In 1995 and 1996, I attempted to locate a complete psychological profile of Alfonse D'Arco, one of the Government's primary witnesses against Mr. Massaro at trial. At and before the time of his testimony, Mr. D'Arco had been accepted into the Federal Witness Protection Program, and my research revealed that psychological profiling of all witnesses in the Witness Protection Program was required by Department of Justice regulation. Seeking Mr. D'Arco's psychological profile, I filed a Freedom of Information Act request with the Department of Justice on July 7, 1995.

3. In September 1995, I telephoned David Kelley, Assistant United States Attorney for the Southern District of New York and the Chief Prosecutor in the *Massaro* trial. In that conversation, I requested the complete psychological profile of Alfonse D'Arco. During that phone conversation Mr. Kelley stated that a psychological profile was not done on Mr. D'Arco prior to his acceptance into the Witness Protection Program or before Mr. Massaro's trial. He also advised a psychological profile had not been done since the trial. Mr. Kelley stated that as Mr. D'Arco's sponsor in the Witness Protection Program, he would be aware if and when such a profile was done.

4. On September 11, 1995, I wrote to Assistant U.S. Attorney Kelley and requested that he either provide me with Mr. D'Arco's complete psychological profile or confirm its non-existence. I further informed him that time was an issue for Mr. Massaro and that I would appreciate a response at his earliest convenience.

5. On September 14, 1995, I wrote again to the Department of Justice to renew my Freedom of Information Act Request of July 7. I requested a copy of the complete psychological profile of Alfonse D'Arco or, alternatively, confirmation that such profile did not exist. I informed the Department of Justice that time was of the essence and that I would appreciate a prompt response.

6. Shortly after January 2, 1996, I received a copy of a letter written by Assistant U.S. Attorney Kelley on January 2 to Steve McAllister, the law school professor with whom I was working on Mr. Massaro's behalf. In that letter, Mr. Kelley contradicted his earlier statement to me that a psychological profile was not compiled for Mr. D'Arco. Mr. Kelley stated that an evaluation of Mr. D'Arco was completed in 1991. In his letter, Mr. Kelley refused to provide Mr. McAllister with a copy of this report.

7. I also assisted Mr. Massaro's lawyers in their efforts to obtain access to the evidence and exhibits collected by the Government in its investigation of Mr. Massaro's case, so that this evidence might be examined by an expert retained by Mr. Massaro in support of Mr. Massaro's post-conviction motions. I am aware that between January and October, 1996, assistant U.S. Attorney Kelley was contacted by attorney Michael Tigar and members of his office, acting on Mr. Massaro's behalf, to arrange a convenient time for Mr. Massaro's forensic expert, Charles V. Morton, to examine and test the evidence in the Government's custody. I am aware that on September 30, 1996, Mr. Kelley agreed that the evidence would be available for Mr. Morton to examine and test during the week of October 21, 1996. I am also aware that Mr. Kelley subsequently told Mr. Tigar that Mr. Morton's review of the evidence would be limited and that he could only see the evidence on one day, October 23. I am aware that Mr. Kelley subsequently agreed to make the evidence available for an additional day if that was required.

8. On Wednesday, October 23, I accompanied Charles V. Morton and attorney James Froccaro, both of whom were retained by Mr. Massaro, for their review of the evidence at the Office of the United States Attorney in Manhattan. Mr. Kelley was not present. Shelly Clark, an assistant investigator informed us that Mr. Kelley had instructed that we be prohibited from opening any plastic envelope containing evidence and that we could not take photographs of any evidence. When we protested, Ms. Clark contacted Mr. Kelley in Washington, D.C. Mr. Kelley then informed us that we could photograph but not unseal any evidence.

9. During the course of our examination, we discovered a number of photographs and other items were missing. We asked Ms. Clark to provide us with the missing photographs, the piece of carpet with purported bullet hole, which was removed from Mr. Fiorito's car, parts of Fiorito's jacket,

crime scene negatives, Mr. Massaro's shoes, and other evidence. We also requested a light box with which to review X-rays, a VCR to review the crime scene video and a tape recorder to review audio tapes. Ms. Clark agreed to attempt to locate these items.

10. On August 24, Mr. Morton and I returned to the U.S. Attorney's office and met again with Ms. Clark. Ms. Clark supplied us with a light box, VCR and tape recorder. She did not provide us with the negatives, carpet, or parts of Fiorito's jacket. We still were prohibited from opening the plastic envelopes containing evidence. When I protested, Assistant U.S. Attorney Kelley was called. When he appeared, he demanded to know Mr. Massaro's legal arguments before he would consider letting us do any experiments or examinations of the evidence. He characterized the evidence as "his evidence."

11. After heated discussion, Mr. Kelley allowed me open the envelopes, and Mr. Morton was permitted to examine bullets and fragments to photograph them. Only after I emphasized our need for the fragments of Fiorito's jacket did Mr. Kelley retrieve those items for us, and Mr. Morton examined and photographed that evidence. Mr. Kelley said he had no idea where the carpet or negatives were, but he agreed to continue looking for them.

12. Mr. Kelley would not allow Mr. Morton to take the evidence to a laboratory for proper examination. Mr. Kelley demanded that we list the evidence we want and explain what we plan to do with it; he stated that once he received this information, he would decide whether he would allow us to examine the evidence.

13. To my knowledge, Mr. Kelley has not contacted any lawyer or expert working for Mr. Massaro to advise that he has located the carpet, crime scene negatives, shoes or any other missing evidence.

Further Affiant sayeth naught.

Date: _____

_____
ERIC KUSKE

STATE OF FLORIDA)
CITY OF) SS:
COUNTY OF)

Subscribed and sworn to before me this _____ day of _____, 1997.

My commission expires: _____.

(Seal)

_____
NOTARY PUBLIC